No. 153.

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Filed Dec. 13, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 153.

THE ARIVACA LAND AND CATTLE COMPANY,
APPELLANTS,

vs.

THE UNITED STATES ET AL.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

STATEMENT OF THE CASE, SPECIFICATION OF ERRORS, BRIEF OF THE ARGUMENT, AND ARGUMENT.

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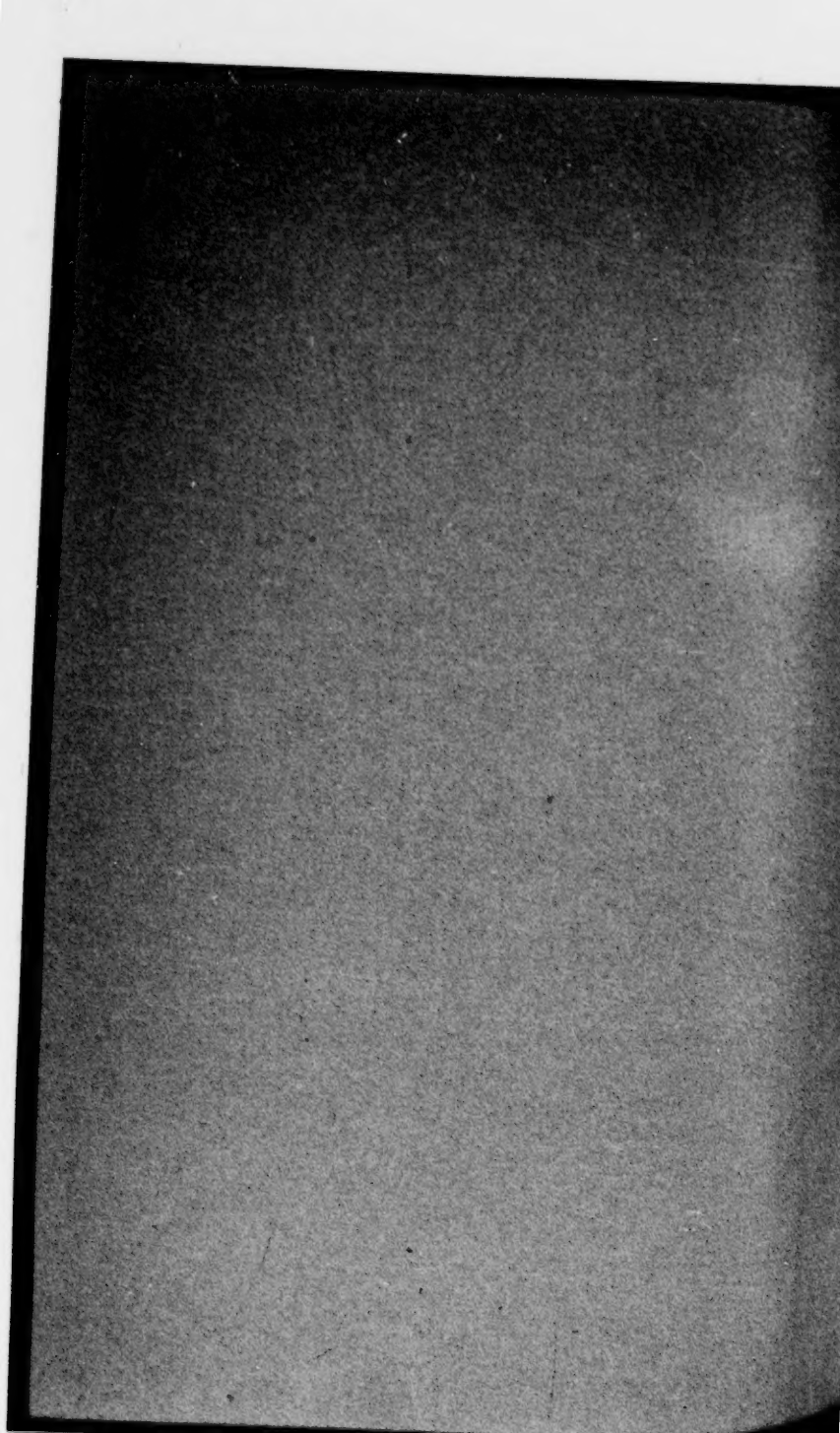

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Statement of the Case, Specification of Errors, Brief of the Argument, and Argument.

I.

STATEMENT OF THE CASE.

This case was instituted by the filing by the Arivaca Land and Cattle Company of its petition (rec., pp. 1–5), in which it alleged that it was the owner in fee of the Arivac or Arivaca land grant, in Pima county, Arizona, and prayed for a confirmation thereof. The petition set out the facts that said grant was instituted in 1812, and on October 10, 1812,

was sold at auction by the proper officers of the Spanish government to Don Augustin Ortiz; that the land was fully paid for at the time of sale, but that final title was not then issued; that the land was occupied by the purchaser, and after his death by his sons, Tomas and Ygnacio Ortiz, continuously up to 1833, when the sons filed a petition with the Treasurer General of the State of Sonora, stating that the land had been sold, paid for, and occupied, as above set out, and praying that proof might be taken as to these facts, and that a title be issued; and the petition further represented that all this was done, and that on July 3, 1833, a grant in fee was issued to said Tomas and Ygnacio Ortiz.

The proceedings before the Treasurer General of Sonora show (rec., pp. 20–22) that testimony of three witnesses was taken as to the landmarks and boundaries of the grant. The statement as to the first witness is as follows (p. 20):

"And having been asked to state whether said Aribac ranch had been settled and occupied by the deceased Don Augustin Ortiz and heirs since the year 1812 up to the present time, and whether the landmarks that designate its boundaries are the same that have existed and do exist today in the four cardinal points, said that from said year 1812 up to his death Don Augustin Ortiz kept said Aribac ranch settled and occupied, and that his sons Don Tomas and Don Ygnacio Ortiz had kept it in the same condition since their father's death up to date; and that concerning the landmarks that designate the four cardinal points, those that I have seen in the examination of the land are the same that have existed upon it without any variation, the one towards the north on the high-pointed hill (devisadero) that rises on this side of the Tajito mine, and borders on the Sierra de Buena Vista; the one towards the south standing on this side of the Longorena mine on a low hill next to a cañon covered with trees; the one towards the east standing up the valley from the spring on a mesquite tree that has a cross cut on it and borders on the Sierra de las Calaberas; and the one towards the west standing at the Punta de Agua on a pointed hill (devisadero) opposite the Sierra del Baboquivari."

The second witness testified that (p. 21):

"The ranch called Aribac has been settled and occupied from the year 1812 up to the present time by the deceased, Don Augustin Ortiz, and his successors, Don Tomas and Don Ygnacio Ortiz; and that the landmarks that designate the boundaries that have just been mentioned on the four cardinal points are the same and without any variation which since that time have designated the limits of their measurement."

The testimony of the third witness was the same.

The Treasurer General thereupon forwarded to the governor of the State of Sonora his report (p. 23) stating that by the proper documents:

"The interested parties show that in the year 1812 two sitios of land for raising cattle were surveyed and sold at auction to their deceased father, Don Augustin Ortiz; that since that time the land has been occupied without any interruption; that there exist today the landmarks placed at that time, and that all dues are paid to the public treasury."

The treasurer further stated that the parties had complied with article 27 of Law No. 30 of May 20, 1825 (Reynolds, p. 131), and recommended that the grant be issued. An order was made reciting that "whereas, the possessory right of the citizens Tomas and Ygnacio Ortiz has been legally proved, and the landmarks and boundaries of the two sitios that were registered and surveyed in the year 1812 at the place called Aribac still exist and have been recognized," and a formal title was issued so that the grantees might "freely cede and alienate said land as they may please and determine as absolute owners and proprietors thereof in fee," and this grant was "duly recorded in the proper book." It further appeared (rec., pp. 25, 26) from the books of record of the State of Sonora for the year 1833 that Tomas and Ygnacio Ortiz had paid the charges due on the issuance of the formal

title, and that the same had been recorded in the Book of Toma de Razon under the proper date.

At the trial the petitioners produced as a witness one Ygnacio Bonillas, a Spanish gentleman thoroughly educated and skilled as an engineer and surveyor, having been educated at the Boston (Massachusetts) University of Technology, and having practised his profession as a surveyor since 1883. He testified that he had made a great many surveys, both in Sonora and Arizona, of land claimed under grants from the Mexican government, and he gave in detail (rec., pp. 12–18) the particulars of his survey of this Arivaca grant. He first located the place called "Old Aribac," and also located the north center monument, which is designated as being on the top of a "devisadero" or "lookout" hill or monument. The south center monument is established on a low hill on this side (or north) of the Longorena mine. The witness testified that he "found such a hill as was described. The Longorena mine is a mine that is well known even to the present time; it is located on the trail that goes from this part of the country to Sonora, and it is well known, and it is so known to the present time; so I went to that mine and then from there I looked towards the north, and the description further says that this hill where the monument is is situated near a gulch where there is a rough growth of timber. There is only one gulch—the Marguita gulch. I looked for this monument on both sides or banks of this gulch, and I found a very large old monument on a low hillock, just exactly as described. Furthermore, this monument is nearly in line with old Aribac and the lookout hill 'devisadero.' They are nearly in line"

The witness testified also as to the location of the monument towards the east, and as to the monument called for on the west he stated as follows (rec., p. 14):

"The title says the monument is established upon a lookout hill at the Punta de Agua. I went to the west, to the water or creek that runs there, and at the proper place I

found the monument. It is there—a very old one. It is on a very high hill, at the Punta del Agua, and all those points are known by those same names today. It is undoubtedly the west center monument. I found the pointed hill or devisadero. The title says that this monument is on this hillock fronting the Sierra Babuquivari, and if you stand at the old ruins and look at the west center monument you will see that it is towards the Babuquivari mountains. The mountains form the background."

The case was argued and submitted and taken under advisement by the court and held under advisement for almost five years, when the order of submission was set aside and further evidence introduced by the United States and also by plaintiff (rec., pp. 39–69). The testimony of the government witness H. O. Flipper was aimed at showing that the grant could not be exactly or precisely located on the ground.

Three of the judges of the lower court were of the opinion (p. 70) that "there is such uncertainty as to the land which was intended to be granted that it is impossible now to identify it," and the grant was rejected on that ground, and two of the justices thought the grant had not been recorded. Mr. Justice Sluss delivered the dissenting opinion, in which he fully discussed the law and the facts, and was of opinion that the grant should be confirmed, and Mr. Justice Stone concurred in this view.

Petitioner was allowed an appeal and duly prosecuted same to this court.

SPECIFICATION OF ERROR.

The court erred in rejecting the grant, because the record shows that every requirement of law was complied with to constitute a complete and perfect title in fee, and the evidence shows that the grant can be located on the ground.

POINTS AND AUTHORITIES.

I.

The issuance of title by the State of Sonora was in compliance with section 28 of the Law of May 20, 1825.

Reynolds, pp. 129–131.

II.

The affirmative evidence and the weight of the evidence shows that this grant can be accurately located.

Testimony of Bonillas, rec., pp. 10–18.

Testimony of Flipper, rec., p. 48.

Testimony of Roskruge, rec., p. 66.

Opinion of Judge Sluss, rec., p. 77.

III.

In this case there are no measurements, and the ordinary rule that statements of quantity yield to natural objects should apply.

U. S. *vs.* Hancock, 133 U. S., 193, 196.

IV.

The entry in the Book of Toma de Razon is a recording of the grant such as complies with the provisions of the treaty.

U. S. *vs.* Osio, 23 How., 273–279.

The grant itself states that it was to be "recorded in the proper book," which was done (pp. 25, 26), and at the foot of the grant is the statement: "This title is recorded on page 15 of the proper book which exists in this Treasury General."

This also is sufficient proof of its record.

Applegate *vs.* Lexington and Carter County Mining Co., 117 U. S., 255–262.

Stebbins *vs.* Duncan, 108 U. S., 32–50.

ARGUMENT.

I.

This title was issued in strict compliance with the statutory law (Reynolds, pp. 129–131). Mr. Justice Sluss in his opinion quotes the provisions of the law under which this grant is issued, and his discussion is so full that nothing need be attempted to be added. The various provisions are set out in Reynolds, pages 129–131. On page 32 of the record herein is given a list of some of the similar grants which were instituted prior to the independence of Mexico and were confirmed and final title issued thereon by the authorities of the State of Sonora. The issuance of a formal paper title for land which had been sold and paid for is an act of natural justice, and was expressly recognized by statutory provision of Sonora, and this was done in very many cases.

II AND III.

The majority opinion herein states merely that the three judges rendering it "are of the opinion that there is such uncertainty as to the land which was intended to be granted that it is impossible now to identify it. The claim is therefore rejected on that ground."

It will be noted that in this very brief dismissal of the case there is nothing to show what land the majority of the court thought was intended to be granted, and no discussion of the evidence by which it was attempted to identify the land. Some of the monuments are conceded by all the witnesses to be correct, and it would seem that an investigation of the evidence would disclose that the weight of the evidence, if not the undisputed evidence, shows that the grant can be located.

The dissenting opinion is very much fuller and carefully goes into every point in the case, and as to this opinion Associate Justice Sonte says:

"I fully concur in the foregoing opinion of Mr. Justice Sluss, both in his conclusions and the soundness of his reasoning, since, upon the undisputed facts in evidence, I can conceive no other rational and just conclusion."

What are the "undisputed facts?" When this case was tried in 1895, the government did not attempt to call in question the correctness of the survey of Ygnacio Bonillas. His testimony was not challenged in any respect, nor was any witness examined on the part of the government. Almost five years later the submission was set aside, and Mr. Henry O. Flipper, "special agent for the Department of Justice, assigned for duty to the office of the U. S. attorney for the Court of Private Land Claims," contradicts Mr. Bonillas in some respects. This Mr. Flipper testified (rec., p. 50) that he had made a report on the Calabasas grant in Arizona substantially as follows:

"I am of the opinion that the title is genuine, notwithstanding it is obscure and indefinite and defective, and I arrive at this conclusion the more readily because I know that there is about all of the titles issued by the Spanish authorities which I have examined something equally obscure, indefinite and defective."

In all the controverted cases which have come before this court Mr. Flipper has been unable to identify the calls of the grants. What was plain to all the other witnesses and to this court he could not see. In the case of Ely's Adm'r *vs.* U. S., 171 U. S., 220, this witness swore that, in his opinion, the country did not conform to the expediente at all and that the central point of the grant could not be identified, but this court said that it judged from the testimony that it was possible to locate the central point.

The testimony of this witness ought not to have the weight

of that of Mr. Bonillas, a wholly disinterested person, competent and experienced in the highest degree.

However, after all the criticisms that Mr. Flipper could make as to the survey of this grant, he testified (rec., p. 48):

"A. After going over the ground thoroughly,—and the description in the title papers is exceedingly indefinite—after going over the ground and with this description I am prepared to say that I cannot locate that grant absolutely, but approximately I think I can locate what I believe to be the north line and the east line and the west line. I think the east center monument is up the valley—farther up the valley than this spring—and the west center monument, probably, is the same one that Mr. Bonillas took. What is described in the title papers as the point of the water is a movable point. The point where the water stops running is farther up or down the creek, according to the season of the year. The south center monument is somewhere south of the Aribac creek; I do not know where. I think the north boundary line as described runs parallel to the general course of the valley, and the end lines will be perpendicular to that line."

Mr. Flipper testified (p. 49) that he was first out at this place in last November (1899), and had never been there before.

Disregarding any other testimony, it is submitted that even by this unfriendly witness the grant can be perfectly well identified. The central point, according to Mr. Flipper, is the place called Arivaca. The west center monument taken by Mr. Bonillas answers the calls of the grant. The east center monument is up the valley. The title paper says that it was on a tree that borders on the Sierra de las Calaberas, and the unquestioned testimony is that going up the valley beyond the spring for a distance of about four miles and a half "there is a small range of mountains running at right angles to the course of the valley" (see testimony of Bonillas, p. 13; of Flipper, p. 52, eleventh line from bottom), and "that there is no chain of mountains

crossing the valley till you come to them" (testimony of Bogan, p. 62, sixth line from top). The east center monument borders, as above stated, on this small range of mountains, which have been conclusively identified, and the point taken by Mr. Bonillas is within half a mile of those mountains (rec., p. 13). This gives the center, the west center, and the east center monuments. The north line, according to Mr. Flipper, can be located by him as running over the top of the "devisadero," on which is the monument known as U. S. L. monument No. 5. This north boundary line, according to this witness, runs parallel to the general course of the valley, and the end lines would be perpendicular to that line. This gives the center, the north line, and the east and west lines, and if there were no evidence as to the location of the south center monument it could easily be located, because, according to Mr. Flipper (rec., p. 50, eighth line from top), "it would be somewhere between the Aribac and the Longoreña mine." If its exact location is not conceded, it should be taken on the line between the Longoreña mine and Arivaca, as far to the south of Arivaca as the north center monument is to the north of that place. A line through this south center monument parallel to the north line would complete the four sides of the grant.

It thus appears that under the evidence given by the witnesses for the government this grant can be located. We submit that under the weight of the evidence the south center monument should be taken at the place where Mr. Bonillas testified it is. This south monument is described as "standing on this side (north of the Longoreña mine) on a low hill next to a cañon covered with trees." The testimony of Bonillas accurately locates this monument in strict conformity with the calls of the title papers (rec., p. 13). Mr. Flipper endeavors to contradict Mr. Bonillas, but does not, in fact, cast any real doubt over the evidence. It is conceded that at the place taken by Mr.

Bonillas as the Longorena mine there is a mine now known by that name (rec., p. 49, 14th line from bottom). Mr. Flipper testifies that he did not find any person who had been there in 1883, and that "it is quite possible that this mine was simply taken up in the old name" (p. 49). This mine is south of Arivaca, thus answering the call of the expediente. Mr. Bonillas testified that "the Longorena mine is a mine that is well known, even to the present time. It is located on the trail that goes from this part of the country to Sonora" (p. 13). The title papers state that at the time they were issued there was a mine called the Longorena, which, according to the description, must necessarily have been very near to the mine now called by that name, and that the present Longorena mine is the same one as the ancient one by that name seems clear to a reasonable intent, if not absolutely certain. Mr. Flipper further testified (p. 50) that at or near the south center monument, as located by Mr. Bonillas, "there is a cañon covered with trees its whole length, and there is a low hill that is next to that cañon." This absolutely conforms to the call of the expediente, and would seem to remove any honest doubt as to the location of this south center monument. The map of Bonillas, facing page 30 of the record, shows the Longorena mine, the Fraquita wash or cañon (printed as "Marquita" on p. 13 of the record) running northwest to the Arivaca creek, and the south center monument next to this cañon, which is covered with trees its whole length. The only difference of opinion is as to the description of the immediate point where this south monument is placed. Mr. Bonillas testified that it is "on a low hillock, just exactly as described. Furthermore, this monument is nearly in line with old Aribac and the lookout hill devisadero." Mr. Flipper testifies that this monument is "on a small mesa covered with slaty rock." As the mine has been identified and the cañon covered with trees and the low hill next to the cañon, it is submitted that it is wholly imma-

terial whether Mr. Flipper describes a particular point as a low hillock or a small mesa. Taking the testimony as a whole, the only reasonable conclusion seems to be that Mr. Bonillas found and correctly located the south center monument.

As is said in the dissenting opinion (p. 77):

"Old Aribac is there; Aribac creek is there; the spring up the valley to the east is there; the Punta de Agua (meaning the point where the creek in ordinary stages sinks in the sand) is there; the cañon covered with trees on the south is there, and the range of mountains on the north is there, and there is the tract beyond the possibility of a doubt."

The majority opinion enters into no consideration of the evidence and gives no reason for the conclusion "that there is such uncertainty as to the land which was intended to be granted that it is impossible now to identify it." Three of the judges without an examination of the evidence thought it "impossible" to identify the land, but the other two, on examination of the evidence, say that the tract is there "beyond the possibility of a doubt," and we think it is entirely safe to urge that the dissenting opinion herein is the one which has some reasons for the conclusions arrived at.

As was said by this court in U. S. *vs.* Sutherland, 19 How., 363, 364, referring to surveys or descriptions of Mexican grants:

"Surveying instruments or surveyors were seldom to be obtained in distant locations. The applicant for land usually accompanied his petition with a deseño or map, showing the natural boundaries or monuments of the tract desired. These were usually rivers, creeks, rivulets, hills and mountain ranges. The distances between the mountains were often estimated at *about* so many leagues, and fractions of this unit little regarded. To those who deal out land by the acre, such monuments as hills, mountains, etc., though fixed, would appear rather as vague and uncertain boundary lines. But where lands had no value, and the unit of measurement was a league, such monuments were considered to

be sufficiently certain. * * * The United States have bound themselves by a treaty to acknowledge and protect all *bona fide* titles granted by the previous government, and this court have no discretion to enlarge or curtail such grants to suit our sense of property or defeat just claims, however extensive, by stringent technical rules of construction to which they were not originally subjected."

The further question remains to be considered, Was the whole or only part of this tract granted, and if part, what part? The learned opinion of Justice Sluss (p. 74) goes into this question fully, and, again to quote the language of his associate, it would seem that one "can conceive no other rational and just conclusion than the one so clearly deduced by him." Justice Sluss says:

"Now, giving this titulo the most narrow construction possible, it plainly purports to convey a tract of two sitios at a certain place with the recital that the tract so conveyed is identified by boundaries which are evidenced by certain specified objects. By any fair construction it purports on its face to convey the whole of the tract within these boundaries. It does not say that it was the conveyance of a right to select two sitios thereafter to be identified, and located within the prescribed boundaries. It purports to be the final act of the government—the investiture of a complete title to a specified tract, with no future act to be performed."

The learned justice shows that the grant could not be one in the nature of a float, and continues as follows:

"The question is therefore presented squarely, Do not the proceedings of the survey, appraisement, sale and conveyance operate as a location of the tract sold within the meaning of the treaty?

"In my judgment the proceedings do have that effect."

After showing that the very object of the survey was to mark on the ground the tract of land to be sold, and that

the appraisement was of the tract of land surveyed, the learned justice adds:

"So I may say that the only fair construction of the transaction is that by the intent of the parties the outboundaries established by the surveyor were the boundaries of the two sitios appraised and sold, and evidenced the location of the tract sold.

"My conclusion, therefore, is that the proceedings of the survey operate as a determination that the boundaries of the two sitios are the landmarks specified in the report of the survey, and that this determination remains true and binding until set aside in a proceeding for that purpose."

The confirmation or grant in 1833 was evidently of the tract of land according to the specified boundaries thereof. The language of the title paper seems to admit of no other construction. The witnesses testified that these boundaries were the limits of the measurements of the purchaser in 1812, and that "there exist today the landmarks placed at that time (1812)," and that since 1812 "the land has been occupied without any interruption," and the decree (rec., p. 23) recites that "the landmarks and boundaries of the two sitios that were registered and surveyed in the year 1812 at the place called Arivac still exist and have been recognized."

All this refers to the whole of the tract, because there is absolutely no suggestion that the right to select part out of the tract was what was granted. If the parties were not entitled to the whole of the tract it is impossible to believe that their rights would not have been adjusted when they made application for title in 1833. If they were entitled to only part of the tract there was no better time than in 1833 to identify once for all what they owned, and if the Mexican government intended to reserve any part of the tract then was the time to declare so.

We think the language of this court in U. S. *vs.* Hancock, 133 U. S., 193, 196, fully applies to the present state of facts:

"It is obvious that the confirmation was of a tract with specified boundaries, and as such covered all the land within those boundaries, irrespective of quantity, and this, notwithstanding there appeared in the prior proceedings statements that the tract contained a certain amount, 'a little more or less,' which amount was very much less than that included within the boundaries."

There seems to be nothing in the language of the petition of the heirs of Ortiz or in the grant or any of the proceedings leading up to the delivery of the final title to show that any one had any idea or conception that the grantees were not to have all the land within the boundaries of the tract identified by the witnesses in 1833.

Justice Sluss points out in the present case what is true of all the grants in the territory acquired under the Gadsden purchase that they are, in the very nature of the case, not "floats," but are sales of tracts of land previously identified by a survey. To attempt to liken these grants to the floating grants made under a wholly different system in California is to attempt a manifest impossibility. The grants by quantity, or floating grants of California, were not surveyed at the time. "The right to so much land to be afterwards laid off by official authority in the territory described passed (in California) from the government to the grantee by the execution of the instrument granting it" (Fremont *vs.* U. S., 17 How., 542, 558). Grants of quantity, or floats, "usually designated the land ceded by the general name of the valley or locality where situated, with a clause annexed that the concession is limited to the specific quantity mentioned, and that the magistrate of the vicinage, of whom possession was to be solicited, should cause the same to be surveyed, and that any surplus existing should be reserved for the use of the nation."

When, in California, the quantity which passed under the grants was surveyed by the officers of the government and segregated from the public domain by the boundaries estab-

lished and the grantee put in possession, "what was previously a grant of quantity became a grant of a specific tract," and the establishment of this tract was in the nature of a judicial proceeding and had all the force and effect of a judicial determination binding upon the former government.

Graham *vs.* U. S., 4 Wall., 259.
U. S. *vs.* Pico, 5 Wall., 536.

The difference between the California and Sonora grants is that this judicial determination of the specific tract which was made after the grants in California was, in the Sonora grants, made before the sale. The proceedings of survey, measurement, appraisement, etc., in Sonora were similar to the establishment of the boundaries by the officers in California. In each case the effect was that of a judicial identification of the tract which became private property.

It will thus be seen that the Sonora grants were executed contracts of sale of the whole of a tract of land the boundaries of which had previously been established by the proper officers of the Mexican government and the value of such tract fixed by the appraisement, so that the sale was "the investiture of a complete title to a specified tract, with no future act to be performed."

This has always been common knowledge in the profession. Mr. Spaulding, in his work on public lands, has as section 511 the following:

"In the treaty of Guadalupe Hidalgo; in the Gadsden treaty; grants in Arizona and New Mexico. 2. Grants (so called) where the land, after certain preliminary proceedings, was put up at auction and sold to the highest bidder. In other words, they are executed contracts of purchase, instead of grants."

These Arizona grants have been before the Court of Private Land Claims for many years. The judges of that court have had extended opportunities for their consideration,

and the conclusions which Mr. Justice Sluss arrived at are certainly entitled to great weight. His reasoning seems conclusive in support of his view that by the survey and appraisement and sale the purchaser acquired title to and dominion over the entire tract by its boundaries against all the world.

In addition to the foregoing testimony, the witness George J. Roskruge, formerly United States Surveyor General for Arizona, and a most competent and experienced surveyor, testified that in 1881, under instructions from the Surveyor General, he had executed a preliminary survey of the Arivaca grant to the extent of two leagues, or 8,680.52 acres This survey takes in the town of Arivaca and Old Arivaca, and includes all the water on the grant.

In Ely's Adm'r *vs.* U. S., 171 U. S., 220, 241, referring to these surveys and the question of excess, this court said:

"If the outboundaries disclose a square or any rectangular figure, the excess of area suggests simply a carelessness of measurement, and can be corrected by a proportionate reduction in each direction. In other cases, the location of the waterway, the configuration of the ground, may be such as to enable a court of equity, by its commissioner or master, to determine exactly what was intended to pass under the grant."

But in the present case there are no measurements and no reason for restricting the area of the grant. The order under which the grant was issued recited, as heretofore quoted, that "the landmarks and boundaries of the two sitios that were registered and surveyed in the year 1812 at the place called Aribac still exist and have been recognized." This is an unqualified statement that the boundaries of the two sitios were the ones testified to, and the case is therefore the ordinary one where there is a difference between the estimated contents and the actual area, and the familiar rule applies that natural objects control statements

of quantity. This rule is as applicable to Mexican grants as to conveyances under the common law, and U. S. *vs.* Hancock, *supra*, is one of the many instances of the application of the rule. Where a tract is conveyed by well-defined natural objects, the evident intention being to convey the whole of such tract, it is believed that no case can be found holding that the statement of quantity controls the natural objects.

IV.

Two of the judges expressed the opinion that this grant "does not appear to have been recorded within the meaning of the treaty of 1853." That view is based on the fact that although there is a proper entry at the proper time in the Book of Toma de Razon, and although the testimonio, or original patent, which was offered in evidence and is conceded to be genuine, bears at its end the endorsement that "this title is recorded on page 15 of the proper book which exists in this Treasury General," still, because the expediente or matrix is not now to be found, there is no record.

Such view is opposed to the holdings of this court and to the practice as followed in Sonora, as shown by the many records which have been before the lower court and this court on appeal. The established and universally followed custom was that an expediente was made, containing a full record of all proceedings up to the payment of the money. There was then issued the titulo or testimonio, which contained the contents of the expediente, sometimes in a complete form, but oftener condensed in part, and contained also the "*pro tanto*," or granting, clause. Note of this title was then made in a book called the Toma de Razon, and at the bottom of the titulo was appended an endorsement that "this title is recorded on page — of the proper book." The expediente was retained in the archives, but the testimonio or titulo was delivered to the grantee as his muniment of

title, just as a United States patent is issued after the land laws of the United States have been complied with.

The treaty speaks of grants which have been "duly recorded." This means, of course, recorded according to the laws and customs of Mexico. The testimonio in the present case, as in every other, provides that the "title shall be delivered after being duly recorded in the proper book," and also recites that "this title is recorded in the proper book." It is evident, therefore, that "duly recorded" means "recorded in the proper book," which was done in this case, as is shown by the copy of the entry from the Book of Toma de Razon (rec., p. 26). This entry appears in the book of record at the proper date, and is shown in connection with the one immediately preceding and following it, so that it is impossible to claim that it was in any respect irregular. The grant was recorded in strictest compliance with the law, and the fact that the expediente has been lost or mislaid is immaterial. Considering the various revolutions in Mexico, and the way in which the archives were moved from place to place, the standing wonder is that the records have been preserved in as good condition as they now are.

The practice of recording land titles in Sonora is similar to the one which prevailed in California, regarding which this court said, in U. S. *vs.* Osio, *supra*:

"Adjudications of land titles were required by the Mexican law to be recorded. That requirement, however, was regarded as fulfilled according to the practice in the department of California, when a short entry was made in a book kept for that purpose specifying the number of the expediente, the date of the grant, a brief description of the land granted, and the name of the person to whom the grant was issued. In this case there is a certificate appearing at the bottom of the instrument to the effect that such an entry had been made," etc.

As heretofore stated, there is a certificate at the bottom of this grant to the effect that such an entry had been made,

and on turning to the book of records the entry is found in its proper place, as called for.

Justice Sluss in his dissenting opinion fully discusses this question of record, and Justice Murray in his separate dissenting opinion also shows that the grant was duly recorded, and counsel feels that it would be useless to try to add anything further on this question.

We think that this grant should be confirmed for the whole of the tract as shown by the monuments and boundaries.

Respectfully submitted.

ROCHESTER FORD,
Attorney for Appellants.

PETITION FOR REHEARING

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE ARIVACA LAND AND CATTLE COMPANY, Appellant, vs. THE UNITED STATES et al., Appellees.	No. 153. Appeal from the Court of Private Land Claims.

(March 24, 1902.)

Mr. Chief Justice Fuller delivered the opinion of the Court.

PETITION FOR REHEARING.

To the Hon. Chief Justice and Associate Justices of the Supreme Court of the United States:

The appellant in the above entitled cause, the Arivaca Land and Cattle Company (a corporation), respectfully applies for a rehearing of the same upon the following grounds:

The Court erred in affirming the decree of the trial Court, and in thus holding that this grant is void for the following reasons, to-wit:

First.

THE ORIGINAL SPANISH VERSION OF THE GADSDEN TREATY, WHICH WAS RETAINED IN THE POSSESSION OF THE MEXICAN GOVERNMENT, DOES NOT CONTAIN ANY REQUIREMENT OR CONDITION TO THE EFFECT THAT A GRANT MUST BE "LOCATED" IN ORDER TO BE RESPECTED OR CONSIDERED AS OBLIGATORY.

The question was orally argued before this Court in the case of *Faxon* vs. *United States*, reported in 171 U. S. p. 244, and likewise in the brief which was filed therein by Francis J. Heney, Esq., on the part of the appellant. The question, however, has never been expressly decided by this Court prior to the decision in the case at bar, although it must be conceded that the case of *Ely's Administrators* vs. *United States*, 171 U. S. 220, leans that way in its reasoning.

The law on this subject is so clear, however, and the fact that the Spanish version of the treaty does not contain the word "located" is so free from doubt, that we are irresistibly led to the conclusion that this Court overlooked that fact in writing its opinion in the Ely case and likewise in this case.

Shortly after the publication of the decision of this Court in the Ainsa case, counsel for certain grant claimants sought the opinion upon the questions involved, of eminent authority upon Mexican law, and we herewith present the essential part of the joint opinion of Hon. Y. Sepulveda, Secretary of Legation at Mexico, and of Hon. Luis Mendez, President of the Mexican Academy of Legislation and Jurisprudence, upon this particular question.

To them belongs the credit of calling attention first to a patent and most important contradiction which exists between English and Spanish copies of the treaty mentioned, in a particular which, under rules of construction of similar treaties, will do away with the element of "location", so held in the Ainsa case as a necessary requisite to confirmation of these grants.

Both the English and Spanish copies of this treaty are originals. Messrs. Sepulveda and Mendez, among other things, say:

" U. S. Statutes at Large, Vol. 10, p. 1031. The con-
" tradiction or mistranslation occurs in article VI,
" of the treaty: *Id.*, p. 1035, as follows:

FROM THE ENGLISH:

Or will any grants made previously be respected or be considered as obligatory which have not been *located* and duly recorded in the archives of Mexico.

FROM THE SPANISH:

Ni tampoco se respectáran, ni considerarán como obligatorias ningunas concesiones hechas con anterioridad que no hayan sido *inscritas* y debidamente registradas en los archivos de Mexico.

" It is apparent that the word 'located' should have " been omitted from the English copy, and the word " 'inscribed' used instead.

" *Dominguez Diccionario Nacional*, inscrito, ta. " part. pas. irr. de Inscribir.

" On the other hand, if the English word 'located' " expressed the intention of the contracting parties, the " corresponding word in the Spanish version would " have been 'colocado'.

" *Dominguez Diccionario Nacional*, 'colocado', da. " part. pas. de colocar o colocarse.

" *Spanish and English Dictionry*, Velazquez, 'to lo- " cate', p. 314; 'colocar', p. 162.

" The word INSCRITAS, in the Spanish text of the treaty, from INSCRIBIR, signifies, speaking of titles by grant, to enter them in writing in some register or book of registers, and, in the legal Mexican expression, the words, REGISTRO E INSCRIPCION, REGISTRADO, é INSCRITO, are used indifferently one for the other, to signify the same idea, that is TO MAKE a note or make a compendium in a book called 'Register Book, Record Book' (Libro de Registro ó de Inscripciones) of the contents of a document. Hence these expressions we find used indistinctly in the Mexican Civil Code; for instance, in Title XXIII. of the Book III. of the Civil Code, which treats of the Public Register, or Books of Record, where note is to be taken of certain titles or documents mainly relating to real estate, we read: Art. 3188. 'The ' REGISTRY (record) shall be made in the office ' where the property mentioned is, according to its ' situation.' Art. 3189. 'If the property should ' be situated in different districts, the registry shall

'be made in all of them.' Art. 3190. 'Ninguna 'inscripción puede hacerse si no consta que el que 'la pretende es actualmente dueño de los bienes, 'tiene derecho para exigir el REGISTRO ó pro-'ceda con podor legal del propietario (No INS-'CRIPTION shall be made if it does not 'appear that the one desiring it to be 'made is the present owner of the property, having 'a right to demand its REGISTRY, or acts with a 'legal power of the owner). Art. 3191. 'Solo 'pueden INSCRIBIRSE los títulos que constan de 'escrituras públicas, y las sentencias y providencias 'judiciales certificadas legalmente.' (There can only be INSCRIBED the titles that appear in public writings and the judicial sentences and orders legally certified.) Art. 3219. 'LAS INSCRIPCIONES 'no se extinguen en cuanto á tercero sino por su 'cancelacion, ó por el REGISTRO de la transmision 'del domino ó derecho real INSCRITO á otra per-'sona' (The inscriptions are not extinguished with regard to third persons, unless they be canceled, or by the registry of the transfer of ownership or right of realty INSCRIBED to another person). Examples might be multiplied to show that in the language of the Mexican laws now as before, and at all times, the INSCRIPTION of a grant or title to land, as well as that of any other instruments or documents, is nothing more than taking note of it or having it entered in a public REGISTER or Record."

Second.

THE SPANISH VERSION OF THE GADSDEN TREATY MUST CONTROL IN CONSTRUING THIS GRANT, BECAUSE

(*a.*) *This identical point was decided in the case of*

U. S. versus Arredondo, 6 Peters 740, where this Court said:

> "The King of Spain was the grantor, the treaty was his deed, the exception was made by him, and its nature and effect depended on his intention, expressed by his words, in reference to the thing granted, and the thing reserved and excepted in and by the grant. The Spanish version was in his words, and expressed his intention, and, though the American version showed the intention of this Government to be different, we cannot adopt it as the rule by which to decide what was granted, what excepted and what reserved; the rules of law are too clear to be mistaken and too imperative to be disregarded by this Court. We must be governed by the clearly expressed and manifest *intention of the grantor, and not the grantee*, in private a fortiori, in public grants."

This has become a rule of property which ought not to be disturbed or changed except for very momentous reasons.

(b) *The best writers on International Law declare that when a treaty is made in two languages, and one expresses a different idea from the other, that text ought to be taken as the original in which the treaty was negotiated, and the other as an authentic translation; and the original text should prevail and the translation ought to be corrected.*

See *Annotations on Marten's Compendium of Derecho de Gentes*, Book VI, p. 179, by Penheyro-Ferreira.

This view of the question is in conformity with the principles governing contracts between individuals.

The presumption is that a contract was entered into in the language of the country where it was made, and especially is this so when the subject matter is an instrument which in most countries, Mexico among them, can only be executed in the official language which is the national language. The treaty of 1853 was negotiated in Mexico and presumably it was negotiated in Spanish, and presumably the text in that language served for its discussion.

(c.) *So far as the rights of individuals are concerned, in construing statutes, treaties, contracts, and written instruments generally, the courts adopt a liberal construction, and if the statute or treaty admits of two constructions, one restrictive of the rights that may be claimed under it, and the other liberal as respects such rights, the latter is to be preferred.*

1 Kent Com., 174;
Sharkes vs. *Dupont*, 3 Pet. 242;
Hauenstein vs. *Lynham*, 100 U. S. 483;
The Amiable Isabella, 6 Wheat. 1;
U. S. vs. *Perchman*, 7 Pet. 832;
North German Lloyd S. S. Co. vs. *Hadden*, 43 Fed. 20;
U. S. vs. *Payne*, 8 Fed. 892.

(d). *The construction adopted by this Court, in its opinion, results in the confiscation of this grant and operates as a forfeiture of a vested property right, for which a valuable and money consideration was paid.*

" No construction of a treaty which would impair that security to private property which the laws

and usages of nations would, without express stipulations, have confirmed would seem to be admissible further than its positive words require."
Strother vs. *Lucas*, 12 Pet. 438.

In the case of *Chew Heong* vs. *U. S.*, 112 U. S. 536, Mr. Justice Harlan, speaking for this Court, said:

> "Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, *the Court cannot be unmindful of the fact that the honor of the Government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected;* and it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the Government were it to doubt for a moment that these considerations were present in the minds of its members when the legislation in question was enacted."

When the Treaty of Guadalupe Hidalgo was being negotiated our Secretary of State wrote to the Mexican Minister of Foreign Relations and said, in relation thereto and for the purpose of inducing Mexico to accept the treaty without the insertion of certain additional conditions and stipulations for the protection of its citizens, that:

> "It is our glory that no power exists in this country which can deprive one individual of his property without his consent and transfer it to another. If grantees of land in Texas under the Mexican Government possess valid titles they can maintain their claims before our courts of justice."

And, said our Secretary of State:

> "The property of foreigners, under our Consti-

tution and laws, will be equally secure without any treaty stipulations."

Again, he says:

> "And here it may be worthy of observation, that if no stipulations whatever were contained in the treaty to guarantee to the Mexican inhabitants and all others protection in the free enjoyment of their liberty, property, and the religion which they profess, these would be amply guaranteed by the Constitution and laws of the United States. These invaluable blessings under our form of government do not result from treaty stipulations, but from the very nature and character of our institutions."

As was said by this Court in *De Lassus* vs. *U. S.*, 9 Peters 133:

> "Independent of treaty stipulations, this right (the perfect inviolability and security of property) would be held sacred. The sovereign who acquires an inhabited territory acquires full dominion over it, but this dominion is never supposed to divest the vested rights of individuals to property. The language of the treaty ceding Louisiana excludes every idea of interfering with private property; to transfer lands which had been severed from the royal domain. The people change their sovereign. Their right to property remains unaffected by this change."

And yet under the construction given to the treaty by this Court, the title to the Arivaca Grant which has been vested in the claimant and his predecessors in interest since 1812 (a period of ninety years), and of which grant he has held undisputed possession during that time, is wrested from him upon the theory that this government *intended* by its solemn contract with

Mexico to accomplish this great wrong and that Mexico was so reckless of its obligations and duties to its own citizens that it consented thereto.

The Mexican Minister at Washington, in a note addressed to the Secretary of the Interior of the United States on July 3, 1888, pursuant to instructions from the Secretary of State of Mexico, explained the understanding of the Mexican Government of that clause of the Gadsden Treaty requiring record evidence in the following language:

> "When the United States acquired a considerable part of Mexican territory, first by the treaty of February 2, 1848, and afterwards by the treaty of December 30, 1853, both governments agreed in their desire to protect the inhabitants in their rights acquired to the lands which changed national ownership and agreed to respect inviolably the concessions (grants) of lands made by Spanish and Mexican governments previous to the dates of both treaties, and in Article 8 of the first treaty and in Article 6 of the second treaty their right of ownership to all their possessions was acknowledged (recognized, sustained) and also their right to dispose thereof as they should see fit.
>
> "But the object of this stipulation was merely to put an end to the abuses that had been committed by virtue of the first treaty in the presentation of fraudulent grants, and it was never the intention to deprive the legitimate owner of a piece of land of his rights thereto merely because he was unable to furnish legal proof of the grant or its record by exhibiting his title in any case, where the archives had been destroyed by the invading United States Army."

Nor ought it to be lightly presumed, we may add,

that it was the *intention* of the high contracting parties to deprive a *bona fide* owner of his land, simply because the government of Mexico had made a mistake in the survey, which had never been discovered by either party, and hence had never been rectified, prior to the treaty. To so hold is to declare that it was the *intention* of these two great nations to make an innocent and humble individual suffer for the *mistakes* of a powerful nation.

Blackstone tells us that in construing a law we should first examine the old law, then the mischief, and next the remedy. We know that article six of the Gadsden Treaty was intended as a *remedy*. We also know that the *mischief* which it was intended to remedy is fairly and correctly stated in the letter of the Mexican Minister at Washington which has just been quoted.

The discovery of gold in California followed close upon the heels of this Government's acquisition of that immensely rich territory, and the phenomenally rapid increase in the value of property, which but a few years before had been liberally granted by the Mexican Government in square leagues and not acres, aroused the cupidity of unscrupulous land-grabbers, and in Pio Pico, who was Governor of California at the time the war broke out, these designing rascals found a willing tool to aid them in their efforts to steal property which had so suddenly become of immense value. It was proven to this Court by unimpeachable evidence in numerous instances, that said Pico had fraudulently

issued grants to different individuals after the war with Mexico had commenced and after the United States had secured possession of a large part of that territory, and that Pio Pico had antedated those grants to the end that they might be held valid under the treaty that terminated said war.

Antedated title papers were issued by Pio Pico in due form of law, and if they were to be adopted as *prima facie* evidence of title by this Government when produced from the pocket of the grantee or by his assignee, who in many cases was a *bona fide* purchaser for value, it would have been practically impossible for this Government to protect its property from gross fraud, because it was an easy matter to establish the fact that many of the records of the Mexican Government relating to land titles had been lost or destroyed, and it thus became almost an impossibility for this Government to furnish conclusive evidence that the title papers in question had been antedated.

Necessity, therefore, compelled this Court to depart from the well-recognized principles of law which it has uniformly applied in passing upon the question of the validity of a title to land in the United States when the grantee holds a patent from this Government to his lands.

The laws of the United States require that a patent to land be recorded at length in certain books which are kept in the archives of this Government at Washington, and in that manner our Government preserves

a record which gives the complete description of the land granted, and yet this Court held in the case of *U. S.* vs. *Marshall Mining Company*, 127 U. S. 569, that the recording of the patent is not essential to the validity of the title of the grantee.

In the case of *U. S.* vs. *Stone*, 2 Wall. 525, this Court said:

> "The patent is the highest evidence of title, and is conclusive as against the Government and all claiming under junior patent or title until it is set aside by some judicial tribunal."

It cannot be doubted that, had this grant remained within the jurisdiction of Mexico, this claimant could have made out a *prima facie* case by simply producing his titulo and proving the authenticity of the signature of the granting officer. The absence of any trace of record evidence in the archives of Mexico would have in no way affected his title, and the burden would rest upon the Mexican Government to establish fraud by clear, convincing and unequivocal proof in order to avoid the grant.

Under the treaty of Guadalupe Hidalgo, it seems to the writer, this Court would have adopted that principle in passing upon the validity of titles to grants in California, just as it did in the early cases under the Louisiana and Florida treaties. But in order to counteract the gross frauds which had been attempted in California, the direct proof of which had been brought to the attention of this Court, it was necessarily compelled to refuse to indulge this presumption, and to

require some evidence that at least a portion of the record of a grant which was required to be made by the Mexican officials existed, or had existed in the archives, or, in the absence of any trace of such record evidence, that the grantee had been in possession of the land for a sufficient length of time prior to the treaty to avoid any suspicion of the *bona fides* of his claim.

As was said by this Court in the case of *U. S.* vs. *Neleigh*, 1 Black 306:

> "The propositions laid down in the *Castro case* and others preceding it were an absolute necessity to save the Government from utter spoliation of its territory * * * The numerous frauds which had been attempted to be perpetrated, depending upon this theory of the destruction of the records, have compelled us to reject it altogether as fabulous."

Yet in the case of *De Aro's Heirs*, 22 How. 293, a grant was confirmed without any record evidence and upon the titulo alone and proof of its genuineness, accompanied with 16 years' possession of the land.

And a careful examination of all the land-grant cases from California will disclose the fact that when the authenticity and genuineness of the title papers were not disputed by this Government, and when the grantee was in possession of the land prior to the acquisition of the territory by this Government for a sufficient length of time to repel the suspicion of fraud, that rule of necessity in regard to record evidence was never enforced.

The writer has not been able to find a single case in which that rule of record evidence was enforced by this Court when the facts of the case did not justify a strong suspicion that the title was conceived and executed in fraud; and the Court uniformly called attention to the facts creating this suspicion and to its existence, in apparent justification of the Court's action in refusing to accord to the title, standing alone, all those presumptions which it would give to a patent from the United States.

In the case of *Gonzales* vs. *Ross*, 120 U. S. 629, this Court quotes with approval from the case of *Byrne* vs. *Fagin*, 16 Tex. 391 that—

> "Where there is a testimonio there is a presumption that the original is among the archives of the land office in its proper place of deposit. At all events, it is for the defendants to show by proper proof that it is not there."

In following Blackstone's suggestion that we examine the old law, then the mischief and then the remedy, we have already seen that under "the old law" the production of the titulo itself and the proof of its authenticity would immediately raise the presumption that the grant had been "duly recorded" in the archives.

We have further seen that the "*mischief*" rested in the fact that it was comparatively easy after the acquisition of California, for Pio Pico, who had been Governor of that territory, to manufacture and antedate grants which it would be difficult to defeat under the well settled *presumptions* of the "*old law*"; and that, there-

fore, the "*remedy*", which the necessities of the times had forced upon this Court, was adopted by our Minister when entering upon the treaty with Mexico for the acquisition of the lands comprised within the Gadsden purchase. It is fair to presume, therefore, that it was the intention of both the parties to that contract or treaty that only such evidence that the grant had been duly recorded should be required, as the investigations of this Court had already demonstrated to be absolutely necessary in order to protect this Government from being despoiled of its property by fraud.

Whatever may have been the mischief against which the United States desired to protect itself by the requirement that the grant need not be respected or be considered as obligatory, unless it had been "located" prior to the treaty, it must be apparent that the minds of the two contracting parties did not meet upon the proposition that the grantee should be deprived of his property in land which had originally been solemnly located by the Mexican Government by a survey made prior to the execution of the grant and made for the very purpose of describing the particular piece of land which the Government intended to convey. To so hold is to inject the words "accurately and correctly" into the treaty, so that it will read, that no grant need be respected or be considered as obligatory which had not been "accurately and correctly" located prior to the treaty. It would seem to be more in accordance with the principles of equity and of natural justice, as well

as morality, to hold that *a grant was "located" within the meaning of the treaty; provided a survey of the grant was made by the Mexican Government prior to the treaty in good faith for the purpose of locating upon the ground the particular land which it intended to convey.*

Any bona fide attempt by the Mexican Government to locate the grant prior to the treaty ought to be considered in equity as an actual location within the meaning of the treaty. In no other way can full justice be done to individuals.

"All courts ought to feel a disposition to support a grant fairly made for a valuable consideration", says Chief Justice Marshall in *Blake* vs. *Doherty*, 5 Wheat. 362, and it is a cardinal rule that "equity abhors a forfeiture."

Third.

THE MOST LIBERAL VIEW WHICH CAN BE TAKEN OF THIS GRANT IS THAT THE GRANT IS A MERE "FLOAT". IF THE LAW OF SONORA OF MAY 14th, 1852, IS READ INTO THE TITLE PAPERS OF THIS GRANT, THE RIGHTS OF THE GRANTEE BECOME AT LEAST AS STRONG AS AND ALMOST SYNONYMOUS WITH THOSE OF THE OWNER OF A "FLOATING" GRANT SUCH AS THIS COURT BECAME FAMILIAR WITH IN THE CASES INVOLVING TITLES TO MEXICAN GRANTS IN CALIFORNIA.

A "floating" grant vested a right of property in the grantee which is protected by the Constitution of the

United States and of which he cannot be divested without adequate compensation.

Fremont vs. *The United States*, 58 U. S. 542:

"The words of the grant are positive and plain *They purport to convey to him a present and immediate interest.*" *id.*

"But although this cannot be regarded as a money consideration, making the transaction a *purchase* from the Government, yet it is the acknowledgment of a just and equitable claim; and when the grant was made on that consideration the title in a court of justice ought to be as firm and valid *as if it had been purchased with money on the same conditions.*" *id.*

"But, as between him and the Government, he had a *vested* interest in the quantity of land mentioned in the grant. *The right to so much land to be afterwards laid off by official authority in the territory described passed from the Government to him by the execution of the instrument granting it.*" *id.*

"The principles decided in this case appear to the Court to be conclusive as to the legal effect of the grant to Alvarado. *It recognizes as a general principle of justice and municipal law that such a grant* for a certain quantity of land by the government, to be afterwards surveyed and laid off within a certain territory, *vests in the grantee a present and immediate interest.* In the language of the Court, the general gift becomes a particular gift when the survey is made; *and when this doctrine has been asserted in this court upon the general principles which courts of justice apply to such grants from the public to an individual, good faith requires that the same doctrine should be applied to grants made by the Mexican Government where a controversy arises between the United States and*

the Mexican grantee." *id.*

See also *Hornsby* vs. *United States*, 77 U. S. 232, Opinion by Justice Field.

In the case at bar, *the grantee paid a money consideration to the Mexican Government for his grant*, and it would seem that *in such a case there can be no possible doubt, but that a court of equity will treat the grant as firm and valid.*

The honor of the United States Government is at stake, and this Court has frequently declared that it was not the intention of Congress to forfeit grants, or to confiscate private property or to determine the rights of private parties under the treaty in a narrow and illiberal manner, but that it is the intention of this Government and of Congress to afford protection and security to all just rights which the petitioner could have claimed at the date of the treaty from the Mexican Government.

U. S. vs. *Agricola*, 1 Wall. 358.

Under the law of Sonora of May 14th, 1852, the claimant had a clear and undisputed legal right to select his "cabida legal" at any place he chose within the boundaries described in his title papers. *This, then, was a vested right of property in the grantee at the date of the Gadsen Treaty. To deprive him of this property right is to confiscate his property without due process of law. It is to declare a forfeiture by a narrow and illiberal construction of the treaty, which was executed in duplicate, and under the Spanish version of which this govern-*

ment is in honor bound to respect and recognize this grant.

Under Mexican laws the right of the grantee was not vested in any particular two (or four) sitios of land within the boundaries described in his title papers. Demasias are defined by Art. III, Chapter I of the Mexican law of 1894:

> " To be thus held by private persons on *primordial* title and to a greater extent than specified, such surplus however being within the boundaries mentioned in the title, and, consequently, mixed up in its entirety with the area for which a title is held."

In this character of grant the Demasias were always treated as being "mixed up in its entirety with the area " for which a title was held". Of course that is only another way of stating that *the "cabida legal" is mixed up in its entirety with the surplus lands* embraced within the boundaries described in the title papers. Hence the grantee never had an indefeasible title to any particular two (or four) sitios of land within the boundaries described in his title papers, *but he had a vested right to select that quantity where he chose within those limits.*

This Court necessarily erred therefore in holding that the grant is void unless the "cabida legal" was originally nailed to the ground at some particular point within the boundaries described in the title papers.

Art. IV of law No. 197 of the State of Sonora, enacted May 14th, 1852, is as follows:

> "The holders shall have the power to select, within the boundaries stated in the grant, the principal, or main, area, which may be more suitable to them, provided that the demasias are arranged in such a way as to make them adjoin each other and form a body, thus allowing them to be sold to advantage." See translation by Dr. J. I. Rodrigues, chief translator for the Bureau of American Republics, as same appears in "ADDITIONAL BRIEF FOR CLAIMANTS" in cases Nos. 109 and 129 (consolidated), October term, 1901.

Until judicial action was taken in Mexico to compel the grantee to select his "cabida legal", or principal area, under said law of Sonora, it must be apparent that "to every and to each part of the land surveyed its "owner had an equal right", as was said by Chief Justice Marshall in the case of *Taylor* vs. *Brown*, 5 Cranch. 234, in construing a grant in Virginia, under its ancient laws which likewise provided that the grantee or patentee could "allot the surplus" in any part of the grant which he chose. The right to "allot the surplus" is the exact equivalent of the right to select the "cabida legal" or principal area. And this right was fully recognized by the law of the State of Sonora, No. 51 of May 12th, 1835, which reads in part as follows:

> "ARTICLE 2. Those are likewise *bona fide* owners who, under the description given in their records of survey, occupy some excess of land; and they are entitled to such excess, even after such excess is shown, without any other requirement

than that of paying for the excess in accordance with the quality of the land at the price which prevailed when the land was measured and appraised, and only in case the owner does not want the excess, or when such excess is very great in the opinion of the government, upon the report of the treasurer, shall such excess be awarded to any one denouncing or soliciting it; and such person shall bear the expense of the resurvey if excess has not been ascertained. In lands measured by calculation none shall be regarded as excess that does not exceed half a sitio."

NOTE.—The foregoing is the official translation, made expressly for this Court and adopted by it in the case of *Ainsa* vs. *U. S.*, 161 U. S. 225.

And this law was not repealed by said law No. 197 of May 14th, 1852, as in Mexico laws are not repealed by implication except in so far as they are repugnant to the later laws.

Compiled laws of Mexico Vol. 3, Page 557.

In the case of *United States* vs. *Moreno*, 1 Wall. 400, this Court said:

> "A right of any validity before the treaty was equally valid afterwards. The act recognizes alike legal and equitable rights, and should be administered in a large and liberal spirit."

And in the case of *Hornsby* vs. *United States*, 10 Wall. 224, this Court said:

> "The word property includes every species of title inchoate or complete. It is supposed to embrace those rights which are executory as well as those which are executed. In this respect the relation of the inhabitants to their government was not changed. The government takes the place of that which has passed away."

Surely it has never been contended, and it cannot be successfully contended, that this grantee did not have a vested right of property at the date of the Gadsden Treaty.

It can make no difference that the out-boundaries of the grant are not fixed with absolute nicety and certainty. Nearly all of the floating grants in California had very loosely defined out-boundaries. The grantee who has paid a money consideration ought not to suffer by reason of the fact that the officers of the Government failed to describe the out-boundaries so that they can be identified with absolute certainty after this great lapse of time. If two sides of the grant can still be located with reasonable certainty, and those two sides meet at an angle the grantee ought to be permitted to select his "cabida legal" at any place within the angle so made by those two sides, and if three sides of the grant can still be located with reasonable certainty there would seem to be no difficulty whatever about giving to the grantee his "cabida legal" in such a way as to assure its being located within the original boundaries described in the title papers.

> "It is not necessary that the grant itself should contain such a description, as without the aid of extrinsic testimony, to ascertain precisely what is conveyed."
>
> *Blake* vs. *Doherty*, 5 Wheat. 359.

It may be suggested, however, that it has not been shown that we complied with Art. II of said law of 1852, and that therefore we have lost our right to *select*

our principal or main area under Section IV of said law. It will be noticed that the "original records of the survey" are to be forwarded to the Treasury. In this grant those "original records" were never in the possession of the grantees or their successors in interest, but were deposited in the Treasury in the first instance, and have remained there ever since. A *copy* thereof *only* was delivered to the grantees (Record, pp. 531 and 234).

This law was not intended to apply to those cases where the *original expediente* remained in the archives, but to those in which said "original records" were lost from the archives, or by some means got into the hands of the owner of the land, as was not infrequently the case.

Fourth.

THE FACT THAT MEXICO LONG SUBSEQUENT TO THE DATE OF THE TREATY WITHDREW FROM THE GRANTEE THE RIGHT TO SELECT HIS "CABIDA LEGAL" IN ANY PART OF THE GRANT HE CHOSE, AND THAT IT ASSUMED THE RIGHT TO SELECT SUCH "CABIDA LEGAL" FOR HIM, CAN IN NO WAY AFFECT THE RIGHTS OF THIS GRANTEE. THE ACTION OF MEXICO IN THIS RESPECT OUGHT NOT TO BE EVEN OF ANY PERSUASIVE EFFECT UPON THIS COURT IN DETERMINING THE RIGHTS OF THIS GRANTEE.

Mexico has not always acted according to the most enlightened views of morality or equity in its dealings with its citizens with respect to their property rights. The congress of Mexico can overturn vested rights of property and can impair the obligation of contracts with impunity. That body is the judge of the constitutionality of its own laws. But because Mexico has so done, it does not follow that it would be in accordance with equity or good morals for this Government to follow suit.

The moment this land became a part of the United States the rights of the grantee, as they existed at the date of the treaty, passed under the protection of the Constitution of the United States.

As was said by this Court in the case of *Pollard's Lessee* vs. *Hogan*, 3 How. 219:

> "*Every nation acquiring property by treaty, or otherwise, must hold it subject to the Constitution and laws of its own government, and not according to those of the government ceding it.*"

The right of the grantee to select his "cabida legal" in any part of the grant he chose, is a vested right of property which under the sturdy principles of Magna Charter and under the Constitution of the United States, and under the principles of natural justice, cannot be taken away from him without adequate compensation. This Court has held that in the absence of any constitutional provision against the impairment of contractual obligations a law which

vests a property right cannot be repealed so as to affect vested rights, and these decisions are based expressly upon principles of natural justice.

Terrett et al. vs. *Taylor*, 9 Cranch. 44;
Fletcher vs. *Peck*, 6 Cranch. 177.

For the foregoing reasons we urge this Honorable Court to recall the remittitur which it has caused to be issued in this case, and to review its decision in the foregoing matter.

Respectfully submitted,

FRANCIS J. HENEY,
ROCHESTER FORD,
Attorneys for Appellant.

We hereby certify that in our opinion the foregoing petition for a re-hearing is well founded in law.

FRANCIS J. HENEY,
ROCHESTER FORD.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE ARIVACA LAND AND CATTLE COMPANY, appellant,
v.
THE UNITED STATES ET AL. } No. 153.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

ARIBAC GRANT IN ARIZONA.

STATEMENT.

On March 1, 1893, the Arivaca Land and Cattle Company filed its petition (R., 1–5) in the Court of Private Land Claims, for the confirmation of the Aribac grant situate in Arizona, alleging the same on the trial to contain 26,508.06 acres (R., 12) or about 6 sitios. The recitals of the petition and the documentary evidence introduced by the claimants on the trial are to the following effect, and upon them the plaintiffs claimed a confirmation of the grant.

On June 2, 1833, Ygnacio and Tomas Ortiz, claiming to be sons and heirs at law of one Don Augustin Ortiz, petitioned the constitutional alcalde of Tubac, stating in their petition that in 1812 their deceased

father paid into the treasury of the capital of Arizpe 8747 and 3 reales as the highest bid for which 2 sitios of land for raising cattle were sold to him at public auction, situated in the place called Aribac, that they were not in possession of the expediente and were without knowledge of its whereabouts and praying that the depositions of three witnesses be taken whereby to prove that said land was settled and possessed from 1812 and also as to the landmarks and boundaries (R., 2, 19–20).

The alcalde proceeded to take the depositions of three witnesses—Lorenzo Carrisosa, Jose Sanches, and Bernardino Madrid—who deposed substantially that the Aribac ranch had been settled and occupied by Don Augustin Ortiz from 1812 to that time (1833), and that the landmarks designating the boundaries in the four cardinal points are: On the north, "the high-pointed hill (devisadero) that rises on this side of [southward from] the Tagito mine and borders on the Sierra de Buenavista;" the one on the south, "standing on this side of [northward from] the Longorena mine on a low hill next to a canyon covered with trees;" the boundary on the east, "standing up the valley from the spring on a mesquite tree that has a cross cut in it and borders on the Sierra de las Calaberas;" on the west, "at the Punta de Agua on a pointed hill (devisadero) opposite the Sierra de Babuquivari." (R., 20–22.) The taking of these depositions was entirely *ex parte*, and no representative of the Government participated in the proceeding.

Ygnacio and Tomas Ortiz then petitioned the treasurer-general of Sonora, through their attorney, to grant them the 2 sitios of land at the place of Aribac, transmitting "documents by which they show their right of property to 2 sitios of land which in the year 1812 were sold at public auction to their deceased father, Don Augustin Ortiz, from whom they inherited the same, * * * and that the price at which it was sold and other imposts thereon have been paid" (R., 22). The "documents" transmitted were evidently the three depositions just mentioned and probably a certificate by the treasurer of Arizpe (as it bears the same date as the petition, R., 19), to the effect that on page 85 of the manual book corresponding to the year 1812 an entry was found, signed by Bustamente, Romo, and Jose Carillo (whose official positions, if any, do not appear), that Don Augustin Ortiz paid into the royal treasury $799, 5 reales and 9 grains for 2 sitios of land at the place of Aribac, for raising cattle, recently sold to him at auction (R., 19).

These papers, to wit, the petition to the alcalde, his order to take testimony, the three depositions, the certified copy of the entry, and the petition to the treasurer-general, were then by the latter referred to the governor of Sonora for action (R., 22, 23), accompanied by a statement of the matter which recites that "by said documents the interested parties show that in the year 1812, 2 sitios of land for raising cattle were surveyed and sold at auction to their deceased father, Don Augustin Ortiz, * * * ; that since that time

the land has been occupied without any interruption; that there exists to-day the landmarks placed at that time, and that all dues are paid to the public treasury." It may be remarked just here that, there is nothing to show that any survey was made of this tract as alleged by the treasurer-general.

The governor, with a preface that "the *possessory right* of citizens Tomas and Ygnacio Ortiz has been legally proved," then ordered that the grant be made in accordance with the law. (R., 23, 24.)

On June 24, 1833, Mendoza, as treasurer-general of the State of Sonora, orders that the title for "2 sitios of land for raising cattle which comprise the place called Aribac" be issued, and that the grantees pay into the treasury the value of the title ($30), in conformity with the laws. This amount was apparently paid in July 12, 1833 (R., 26). In view of the fact that under section 15 of the State law of May 20, 1825, the title was "given gratis" (Reynolds, p. 130); and the further fact that the law requiring the payment of $30 was not enacted until the year following this alleged exaction (Reynolds, 190; article 71 of the law of July 11, 1834), suggests the inquiry as to whether this *título* is not antedated, and also suggests the propriety of the strict enforcement of the California rule and the treaty requirement to the effect that claimants furnish full archive evidence of their grant before permitting a confirmation in this cause, a matter to be more fully discussed hereinafter.

On this state of facts Mendoza proceeds, on July 2, 1833 (R., 24, 25), to issue the title and grant for "2

sitios of land for raising cattle and horses, which comprise the place called Aribac," and declares that the expediente shall remain in his office as "a perpetual record." The record shows it is not there.

Mendoza recites as authority for the grant article 11 of the superior decree No. 70 of August 4, 1824 (Reynolds, Spanish and Mexican Laws, p. 118), and law No. 30 of May 20, 1825, of Sonora (Ibid., 129–131; R., 18).

The title paper presented has an indorsement that it is recorded on page 15 of the proper book, presumably the toma de razon of 1833 (R., 25). The record shows (p. 69) that an entry of the issuance of this title does appear in that book, but on page 1 of leaf 13, not on page 15.

An examination of the record reveals the fact that, the titulo produced from private custody and the entry in the toma de razon of 1833 constitute the sole evidence of the grant. The expediente of 1812 is not in the archives nor is there found any trace or remembrance of it; the alleged entry of October 10, 1812, copied in the titulo, is not there; the expediente of 1833 is not there. The document introduced in evidence is a titulo (or copy of the expediente) which comes from the Surveyor-General's office, having been deposited there by the then claimants of the grant in their proceedings before that official in 1880, under the provisions of the act of Congress of July 22, 1854 (R., 3). Thus the sole record evidence of this grant is the brief toma de razon thereof, found on a page of the "proper book," different from that recited in the titulo.

The petition filed in the Court of Private Land Claims contained the further allegation that under the provisions of the act of Congress of July 22, 1854, the grant was investigated by the surveyor-general of Arizona and by him recommended to Congress for confirmation, but that no action was taken thereon by Congress or by any authorities of the United States (R., 3, 4); that the said grant was duly recorded in the archives of Mexico (R., 4); that all the steps and proceedings taken on the sale of the said land were regular, complete, and in due and full conformity with the laws, regulations, and customs then in force for the conveyance of land by grant, and vested a complete and perfect title in fee in and to said lands in said grantees (R., 4); that the petitioner is entitled to a confirmation of said grant in accordance with the metes and bounds set forth in the *original surveys and grants* of the same (R., 4), which original survey, it will be recalled, does not appear in the record. The adverse claim and holding of portions of the grant by the respondents other than the United States is set forth, and, with other allegations, the petition closed with the usual prayer for relief.

The answer of the United States (R., 6–9) puts in issue the material allegations of the petitions, and contained the following affirmative averments:

That whatever proceedings may have been taken toward procuring said grant in 1812, the same were never carried to final title of the grant, and the title never passed from the Spanish Government (R., 7).

That the proceedings of 1833, if had and taken, were without authority of law and void (R., 7).

That if the said alleged grantees paid the expenses of said proceedings as alleged, amounting to $30, the same was in violation of and contrary to the terms of the law under which it is alleged said pretended title was issued, in this, that said law required that such titles as it authorized to be issued should be gratis, and no law existed for the payment of such fees prior to 1834 (article 71, Reynolds, 190); that said payment was evidently made under the provisions of said law, and that therefore said grant was antedated, and not made, if at all, upon the date it purports to have been made (R., 7, 8).

That under the provisions of the law of the National Government of Mexico all persons in possession of lands in the years 1833 and 1834 were required to present their titles or claims to the National Government for confirmation and examination within the space of six months, and failing to do the same, they were forfeited and abandoned to the Government; and this failure of the claimants so to do is pleaded as a bar of any remedies the claimant might have against the Mexican Government and the United States (R. 8).

On February 13, 1899, the claimant filed an amended and supplemental petition pursuant to leave of court (R. 9) which contained the following:

> That prior to the treaty known as the Gadsden treaty no resurvey of said grant had ever been applied for or ordered by anyone, and that neither of the grantees or their successors

in interest had prior to said treaty any knowledge or notice that within the said monuments there was an excess of land over the area stated in said title papers, and petitioner avers that the grantees under said grant were, under the laws of Mexico and the State of Sonora, existing at the date of said treaty, and for a long time prior thereto had been holders in good faith of any such excess or surplus, if any such there is, and entitled to occupy and retain the same as owners, even after such overplus is shown, without other obligation than to pay for the excess according to the quality of the land and the price that governed when it was surveyed and appraised; and petitioner further avers that if this honorable court should decide that said sale, as recited in said title papers, did not, as petitioner avers it did, convey to the grantees therein all of the said tract of land to the monuments described in said title papers, without further payment therefor, he is ready and willing and now offers to pay to the United States of America any amount that may be found to be due from it for such overplus, and also the costs for ascertaining the same, as soon as the amount of the same and the sum therefor is ascertained. (R., 38.)

And a tender of $300 in gold coin was made to the United States as payment for such overplus or excess, and $200 for the costs of ascertaining the same. (R., 38, 39.)

A trial and submission of the case was had in 1895 (R., 10–18), but the latter afterwards set aside (R., 39), and further hearing had. (R., 39–69.)

The evidence presented on the trial, in addition to the documents already presented, was directed entirely to the question of the location of the grant and upon the case as made by the evidence in this issue, the court (R., 70) rejected the grant because there was such uncertainty as to the land which was intended to be granted as to render it impossible now to identify it.

Justices Reed and Fuller advanced the further reason for rejection that the grant was not recorded as required by the treaty. Justice Murray, concurring in the result, was of the opinion that the grant is duly recorded in the archives of Mexico.

From the majority opinion Justices Sluss and Stone dissented, and a lengthly opinion was filed by Mr. Justice Sluss (R., 72–78) in support of his views, in which Mr. Justice Stone concurred.

The grounds of the decision involves a statement of the oral testimony on the trial. The witnesses for the claimants were two—Ignacio Bonillas in chief and George J. Roskruge in rebuttal. The names of these witnesses are already familiar to the court as borne by the two surveyors who have invariably been called by claimants in these Arizona cases to sustain their remarkable and extravagant surveys; and in view of the professional connection of these witnesses with this whole litigation, the suggestion of opposing counsel in his brief that Bonillas, the principal witness for claimant in this case, is "a wholly disinterested person" (p. 9) must have been intended as humorous, as indeed it is.

The survey of Bonillas, as might be expected, includes several times the quantity named in the title

papers. In this instance, however, the quantity surveyed is comparatively modest in its excess; in the San Rafael de la Zanja and Agua Prieta surveys now before the court he surveyed ten times the area granted; in the present case only three times that area.

After stating his qualifications and experience (R., 10, 11) Mr. Bonillas testified to the genuineness of the signature of Jose Maria Mendoza attached to the *título* presented, a point not controverted by the Government (R., 11). He also testified (R., 12) to a survey of the Aribaca grant made by him in February and March of 1894, by which he found the area to be 26,508.06 acres, this survey having been made by triangulation (R., 12), and without regard to the area named (R., 17). Postponing for later consideration and to be considered separately the several boundary calls, the only other features of the testimony of this witness sufficiently material to justify its being stated is the following: He testified that, the recitals in the patent by Mendoza without the testimony of the witnesses taken before the alcalde upon the petition of Tomas and Ignacio Ortiz would not enable him to locate the grant (R., 15, 16), in which connection is to be noted the mutual admission of counsel (R., 14, 17) that they had been unable to find the expediente of this grant, either that of 1812 or of 1833, in the archives, it thus resulting that Bonillas' ability to locate the grant at all was admittedly derived from a paper outside the archive evidence of this grant, a fact most pertinent to the inquiry to be presently made as to

whether this grant was "duly recorded" under the Gadsden treaty. He further testified that the form of the records at Hermosillo on all regular land grants is the retention of the expediente on file in the archives, and the making of a toma de razón of the title upon its issuance, the title as issued consisting of a copy of the expediente with the granting clause attached (R., 16).

The location of this grant by natural objects turns upon the *situs* of five descriptive calls, which, with the testimony of each witness applicable thereto, will now be considered seriatim.

1. The old town of Aribac, described in the title as "the old and depopulated town or settlement called Aribac."

Bonillas testified (R., 12) to the location of this place as being at the point indicated on his map found opposite page 30 of the record, and being thus about a mile and a half from the present town of Aribac along the road. He based this testimony upon inquiries made from people who have lived there and others who have traveled along that road, and also upon the fact that ruins of houses are to be seen there (R., 12).

Henry O. Flipper, special agent of the Department of Justice, testified on this point (R., 48) that the present village marked Aribaca appeared to be older than the place marked "Old Aribaca" by Bonillas, there being at the former place ruins consisting of mere mounds of stone, and thus indicating greater age than the existence of fallen-down houses. Another reason

for believing the original Aribaca to have been at the site of the present village is the fact that the only agricultural lands in the valley are at the present village, and that it was thus a much better place for settlement than the point selected by Bonillas (R., 48, 49).

Charles Bent, miner, called for the Government, testified (R., 53) as to his having lived in the Aribac country for some fifteen years after 1874, at which time there was no one living there but a solitary sheep herder and he did not claim under the grant; that the original town of Aribac was generally considered as being located where the present town is, and there are more adobe houses at the present town than below (R., 54).

John Bogan, county assessor, called for the Government (R., 57), testified to the same effect.

N. W. Bernard, county supervisor, also called for the Government (R., 62, 65), testified that in his opinion the point called by Bonillas "old Aribac" was the original settlement, although he admitted that the older ruins seemed to be at the present town, where also the valley is wider (R., 62, 63).

George J. Roskruge, called for claimant, testified to the location of old Aribac at a distance of a mile and a half from the present town. While the transcript is not entirely clear, it is probable that the point at which he fixes the old settlement is the same as that adopted by Bonillas, to wit, about a mile and a half down the river or west from the present settlement (R., 66, 68).

While it is not believed that the location of the old

place of Aribac as between the two points testified to by the witnesses is of any importance, since it is not pretended that the place was the center or initial point of the primitive survey, the difference between the witnesses is useful, as it emphasizes the uncertainty in attempting to locate, in a wild and unoccupied country, natural objects of the vagueness named in the *titulo*, and as thus affording strong support to the conclusion of the court in finding this tract incapable of identification.

2. The north boundary, stated in the *titulo* to be on the high pointed or lookout hill (devisadero) that rises on this side of the Tajito mine, and borders on the Sierra de Buenavista.

The controlling calls here are the Tajito mine, the Sierra de Buenavista, a lookout hill.

Bonillas testifies that he was unable to locate the Tajito mine (R., 12); that nobody had ever heard of the Sierra de Buenavista (R., 12); and that so far as the existence of a lookout hill is concerned, "there are a number of hills that would answer that description" (R., 13). He justifies his having gone miles north of the Aribaca River for a lookout hill, on the ground that on that hill is an old pile of stones that is *not* a United States official monument (R., 13), and he argues the age of this and the other piles of stones upon which his whole survey depends, from the fact that some of the rocks are mossy and "are almost covered with sand the wind has carried there" (R., 17). The foregoing, which is believed to be a fair statement of

the testimony of this witness as to the location of the north boundary of this grant, and the only witness, be it remembered, produced by claimant to locate it, is a sample of the testimony by which it is sought to wrest from the United States the patent for a valley occupied by hundreds of people (R., 54) engaged in mining and agriculture, and, in many instances, holding under homestead and other title from the United States (R., 61).

Flipper, who made an examination of the Bonillas survey on behalf of the Government in November, 1899 (R., 40), identified the Bonillas north boundary, as well as the other Bonillas boundaries, with the aid of R. N. Leatherwood, one of Bonillas's assistants (R., 41, 66), and also by the markings placed on the rocks by Bonillas (R., 41, 47). Mr. Flipper testified as to this alleged north monument (R., 41) that he found it on a high ridge about 2½ miles from the town of Aribac, at the northern extremity of the Guijas Mountains, the monument being one of two low piles of stones, a few feet apart, found at that point: that said pile is artificially built on the outcropping from the side of the hill (R., 42), and this, as the other monuments, is very recent (R., 45, 47, 49): that this monument is not on a look-out hill, but on a ridge (R., 42, 52), and one can not overlook the Aribac Valley from it, the Guijas Mountains being between (R., 42): that considering the Guijas Mountains to be the same as the Buenavista Mountains named in the *expediente*, it is evident that this is not the hill contemplated by the titles, since

under the description the monument was to be between the mountains and the river, whereas the Bonillas north monument is on the north side of the mountains, leaving most of the latter inside the grant (R., 42, 43). Mr. Flipper further testified, as did Bonillas, that there were a number of other *devisaderos*, or points from which a lookout might be kept for Indians, (R., 42, 51) in that vicinity (R., 43), among them being the point marked "Red Hill" on the Bonillas map, and another known as "Telegraph Hill," on which United States land monument No. 5 is located, as shown on the Bonillas map, and also two or three other sharp peaks answering to the name of *devisaderos* (R., 43). On Telegraph Hill there is a large monument, now Location monument No. 5 (R., 43), but, as will be presently seen from the testimony of the witness Bogan, this monument existed prior to its establishment as such Government monument (R., 58). On the Red Hill just mentioned there is a monument fully as tall as witness (R., 51), and piles of stones are found on all the prominent elevations (R., 46). It thus clearly appears from Mr. Flipper's testimony that the point selected by Bonillas is not a *devisaderos*, whereas there are in that vicinity a number of *devisaderos* with piles of stone on them. There is absolutely no testimony, however, either in the nature of tradition or otherwise, showing which *devisadero* was meant by the witnesses of 1833. The Buenavista Mountains do not fix it; they are not known. The Tajito mine does not fix it. Flipper agrees with Bonillas (R., 42, 51) that no one knows where this is or was

in 1833. The pile of stones does not identify it; there are piles of stones on all of these high hills. Unless we are to resort to absolute conjecture and speculation, it must be held, with the court below, that claimants have not fixed their north boundary.

Witness *Bent* testified to the abundance of these piles of stones all over that country, ascribing the fact, as did Flipper (R., 46), to the ancient mining operations in that country and the erection of Indian fortifications (R., 45). Witness mentions the fact that there are a number of large lookout hills north of the river, among them that on which monument No. 5 is located, that monument having been a very old one as far back as 1875.

John Bogan likewise testified to an acquaintance with the country since 1878, during which time he had become acquainted with "every hill, canyon, and valley" in the vicinity. He testified with Bonillas that he had never heard of the Tajito mine or the Buenavista Mountains. (The stenographer's notes are misleading on this last point.) He also testified as to the existence of a number of hills or *devisaderos* northwest of Aribac, the Gijas Mountains being all hills or peaks commanding a view of the Aribac Valley up and down the river. Witness testified to his knowledge of Telegraph Peak as located about three-quarters of a mile north of the river and as that upon which United States location No. 5 is situated; that said location monument was built in 1884, but that prior to its erection there was an old monument there

and the mineral monument was built on top of the other monument, witness being present at the time, and that this hill and monument are very commanding, showing a view up and down the valley (R., 58). Witness testified to the existence of numerous other *decisaderos* or lookout hills in the section north of the Aribac River, with old monuments on them. He mentioned among these Red Hill, shown on the Bonillas map, and also three other peaks in the mountains north of the river and between the Red Hill and Telegraph Hill (R., 58). These were indicated on the Bonillas map used on the trial by the letters A, B, and C, but do not appear on the map as embodied in the printed transcript.

In Bogan's examination appears the following (R., 60):

> Q. What would you say of a description which says, being on a high lookout hill, which is this side of the Tajito mine and is bounded by the Buenavista Mountains—what would you say as to that description? Does that apply to only one place or a number of places within your knowledge?
>
> A. A number of places.
>
> Q. A number of places fill that description?
>
> A. Yes, sir.

Witness further testified that looking from the Bonillas' lookout point, nothing can be seen of the Aribaca Valley north and south (R., 62), a very important circumstance when the purpose of the alleged concession and all the surrounding topographical features are considered.

N. W. Bernard testified to the existence of Telegraph Hill as a *derisadero* to the north of Aribac, from which one could see the whole of the Aribac Valley for 25 miles, and also as to the existence of an old pile of stones located thereon (R., 63). Witness testified to having gone with Bonillas to the west center, south center, and east center monuments (R., 64, 65), and to the fact that Bonillas *put the monuments up himself* in the presence of witness (R., 64). This testimony from a man of the personal and official standing of Mr. Bernard that Bonillas *built* the monuments upon which his survey is so largely based would seem to have called for some denial from Bonillas, but none was given. No wonder these monuments appeared to Flipper on his visit in 1899 to be "recent."

3. The south boundary, stated in the *título* to be a monument "standing on this side of the Longareña mine on a low hill (loma) next to a canyon covered with trees."

The elements of this call are thus a low hill next to a canyon covered with trees, and situated somewhere between the Longareña mine and the Aribac settlement.

Bonillas testified (R., 13) that the Longareña mine "is well known even to the present day," and that he went to the mine and that looked toward the north. There is only one gulch, the Marquita (Fraguita), and looking for a monument on this gulch, witness found a very large old monument on a low hillock "just exactly as described," and that this monument is

nearly in line with old Aribac and the lookout hill taken as the north boundary (R., 13), the reliability of which has just been discussed.

This, briefly but it is believed fairly stated, is *all* the testimony which claimant furnishes to carry this grant to the south boundary selected, and thereby to include at least 15,000 acres more land than there is any pretense was paid for. The calmness with which Mr. Bonillas's testimony of a few sentences is submitted, as if his *ipse dixit* were sufficient, is impressive, but it is not believed conclusive, especially when it is recalled that Mr. Bernard saw witness build this very monument.

It is not believed that, this very vague and uncertain testimony needs any contradiction, but it is submitted that the testimony of the Government witnesses will make very evident what already appears from claimant's testimony, that there is no such identification of the boundary call as to justify its adoption.

Mr. Flipper testifies (R., 45) that the mine which Bonillas identifies as the Longareña is really a modern mine of that name, having been so located in 1877, or thereabouts, and that he could find no one who knew of a mine bearing that name previous to 1877; that so far as the call for "a small, low hillock (loma) near a valley full of trees" is concerned, there is to be found on the south side of the Aribac River not only the Fraguita Gulch or wash, to which Bonillas referred, but also one equally well known called the Yellow Jacket wash, and that there are trees along its entire

length, resulting from there being water in it, and there are also lomas or hills along its entire length and on both sides of it, with piles of stone to be found all along the wash (R., 46). Witness testifies to the very recent character of the Bonillas monument and identifies a photograph of it as well as of the others taken by him A glance at these photographs, which appear in the original transcript in the clerk's office, will show the very modern nature of these "monuments" of stone. Not only is the appearance of these monuments recent, but the places in the ground from which the stones were taken for their construction were apparent to witness (R., 49).

Witness stated that assuming the Longareña mine of 1833 to have been at the same place where the location of 1877 was made, then the south boundary would be at some point between Aribac and that mine, but whether it would be closer to Aribac or the Longareña witness could not say; and that on the canyon near the mine there are trees and low hills the whole length of the canyon and the latter are found on both sides thereof (R., 50). Witness testified that the Bonillas monument was placed not on a loma, as required by the titles, but on a small mesa or table-land covered with slaty rock (R., 48, 50, 53).

Witness *Bent* testified to the fact that on the hills and elevations on the south of the Aribac Valley are to be found innumerable piles of stones in every direction, the "country being full of them" (R., 54); that he knew the Longareña mine first in 1877 and knew the parties who located it, and it was located under that name, but

that if it had any name before its location witness did not know of it; and this, although prior to its location as the Longareña, witness had himself had it located, but under another name, thus showing that the name ascribed to it by Bonillas was not by any means the one it had always borne. Witness also testified with Mr. Flipper as to the existence of the Fraguita and Yellow Jacket canyons between this mine and Aribac, that these canyons have trees, that they are also fringed with hills, and that upon these are a large number of piles of stones, whose presence is due to a large extent to the fact that the country has been taken up with mining claims (R., 56).

Witness *Bogan* testified (R., 59) to his acquaintance with the country south of the Aribaca River for some miles, and to the fact that the Longareña mine first went by that name when it was located by one Ben Burgin in January, 1877. He also testified as to the existence of numerous small hillocks along valleys full of trees between the mine and the river, mentioning the Yellow Jacket gulch as one of these, and the fact that there are numbers of piles of stone to be found on these low hillocks in these valleys (R., 59). In his examination the following is found:

> Q. Well, the descriptions says that there is a pile of stones on a small, low hillock near a valley full of trees. From your knowledge of the country does that convey to your mind any definite place where such a location can be found?
>
> A. No, sir; it does not.

Q. Are there few or many such small, low hillocks in the vicinity that would answer that description?

A. Many.

Mr. Bernard testified (R., 64) that he knew of the Longareña mine, it being the one located by Ben Burgin; that he had never heard of an old mine by that name; that there are a great many old mines out there, but Burgin located this and gave it that name. Witness testified also (R., 64–65) to the existence of three or four valleys south of the Aribaca River with trees in them and piles of stones found abundantly on the elevations along the valleys (R., 65).

It is believed that, even assuming the Longareña mine to have been in 1833 where claimant contends—an assumption that the record does not for a moment justify—the call for a boundary on one of the innumerable lomas found in the 2 or 3 miles intervening to the Aribaca Creek does not afford any sufficient basis to support a judgment fixing any particular one of such lomas as the boundary.

4. The east boundary, described in the *título* as standing up the valley from the spring on a mesquite tree that has a cross cut in it and borders on the Sierra de las Calaberas.

The call is thus for a marked mesquite tree somewhere above the spring and on the edge of the Sierra de las Calaberas.

Bonillas testifies (R., 13) that he found a spring about a mile up the valley from old Aribac, a physical fact that is not contested; he does not claim to have

found the Sierra de las Calaberas or to have ever heard where it is; the nearest he could come to a marked mesquite tree was a stump of a mesquite; and the nearest to a monument at that tree was a large pile of stones about 500 feet distant therefrom. He testified to having found a little chain of mountains crossing the valley at right angles about 4½ miles up the valley, which it is assumed that he took as his Sierra de las Calaberas, although he does not say so, and even this is, according to his testimony, about a half mile from his mesquite stump (R., 13), which is thus hardly to be considered on the edge or border of this mountain.

It can hardly be conceived that a boundary location such as this, failing in every detail to conform to the titulo, needs any testimony to combat it.

Mr. Flipper, however, testifies affirmatively (R., 43) that these mountains are *not* known as the Calaveras, but the Pajarito Mountains, and that no one in that section had so far as he could ascertain ever heard of the Calaveras Mountains; that Mr. Bonillas's monument is on the edge of a mesa about a quarter of a mile north of the Aribaca Valley and about midway between two large black-oak trees. Mr. Flipper very forcibly shows (R., 44) that while the titles place this monument up the valley from the spring, the Bonillas monument is a quarter of a mile *out of* the valley and north of it and about 4 miles southeast from the spring, and that the nearest thing in the way of mesquite trees are three mesquite stumps without marks of any kind about 200 yards northwest from the monument,

the center stump being 200 yards farther out of the valley than the monument; and that the oaks are both larger than the mesquites. It is quite evident that had the east boundary been located as claimed the identification of it would have been by reference, not to a mesquite tree an eighth of a mile away, but rather by reference to the oaks, at whose very base it was. Referring to the pile of stones adopted—not to say erected—by Bonillas, Mr. Flipper testifies that it is a modern monument, and, as illustrating its unreliability as a boundary call, he shows (R., 44) that within 300 or 400 yards were to be found no less than thirteen similar piles of stones, and that there was nothing peculiar in the piles of stones referred to by Bonillas, except the fact that they had been built up, piled up high, recently. (R., 45.) As to the general formation of the Pajarito Mountains, witness stated that they were characterized by rough, large bowlders of gray sandstone, but that while *calaveras* means skulls, there was nothing about these bowlders to suggest skulls. (R., 52, 53.)

Witness Bogan, asked about the Calaveras Mountains, stated that he had never heard of them, and that there are, in fact, no such mountains in that country (R., 60); that while he knew a spring up the Aribaca Valley, he had never known a marked mesquite tree up there.

He further testified as follows (R., 60):

> Q. From your knowledge of the country, could you take this description and find it up

the valley from the spring at a mesquite tree which has a cross and is bounded by the Calaveras Mountains, could you locate such a description as that?

A. No, sir.

Q. Would the fact that there was a pile of stones within a hundred yards enable you to make any such location as that?

A. No, sir.

Q. What as to the presence or lack of such piles of stones in this valley above the spring, are there many or few?

A. There is a good many.

Q. When you first went there, in 1878, what as to the presence of piles of stone in those localities?

A. There were many there then.

This witness further testified (R., 62) that the valley about 4½ miles above the spring is crossed at right angles by a small range of mountains, called the Pajarito, these being the first chain encountered going up the valley.

It was contended by claimant on the hearing, and seems to be urged in its brief, that this fact fixes the east boundary, since the mesquite tree mentioned is recited to border on the Calaveras Mountains, and this, being the first mountains encountered, must be that intended by the titulo. Claimant, however, overlooks the fact that the tree referred to might be on the edge or border of an elevation running parallel with the river instead of perpendicular to it. As is shown by the plats in evidence (both that of Bonillas and that of

Roskruge, to be presently considered), there are elevations both north and south of the river to which this name might have been in 1833 applied, and, indeed, Roskruge's map, in so many words, shows the Sierra de las Calaveras to be a range running on the south side of the Aribaca River and parallel to it. This is a thoroughly reasonable theory, since it obviates the necessity of assuming that these mountains above the spring, which are now so well known as the Pajaritos, were sixty-seven years ago called by an entirely different name. It further obviates the absurdity that supposes that if these mountains were situated as claimant contends, the old witnesses would have selected a mesquite tree at their foot as marking the boundary and not the mountains themselves. It is evident that had they constituted the eastern wall of this grant—the first obstacle encountered in going east—they would have been named as the east boundary and not an insignificant tree at their base. Whatever may be thought of Roskruge's other theories, his location of the Calaveras Mountains is much more reasonable than that now urged by counsel for claimant.

5. The west boundary, fixed in the titulo as standing at the Punta de Agua on a *devisadero* opposite the Sierra de Babuquivari.

The three controlling elements here are a *devisadero* or lookout hill, the Punta de Agua or place where the water disappears in the sand downstream from Aribaca, and finally the mountains just named. The last is a well-known mountain range many miles to the west of

the tract in question, and as any *devisadero* or prominent hill in that country would be opposite to it, it is not a controlling or, indeed, helpful element of description. This boundary, then, reverts to the two elements, a *devisadero* and the Punta de Agua. Neither of these are certain, for the reasons to be presently developed. First, that there are as many *devisaderos* to the west and south of the river as we have seen there were in the direction of the north boundary; and second, the point at which the water in the stream disappears is a variable one, dependent upon the time of the year, and indeed the character of the year, as to its being dry or otherwise. In fixing this call, as in the others, Bonillas seems not to have experienced the slightest difficulty. He states (R., 14) that he went to the west to the Punta de Aqua and there upon a very high hill, "at the proper place," he found a very old monument and that standing at the old ruins, and looking toward this hill it is seen toward the Babuquivari mountains, which form the background. This is, concisely stated, all of claimant's testimony on the subject.

Mr. Flipper testified (R., 47) that he went to Bonillas' so-called "very old" monument and found it to be a recent one, with no moss on the lettering, which is in English. Witness was also at the point of water, and at the date of his visit (November 18, 1899, which is in the wet season in southern Arizona), the end of the water was about a mile and a half *up* the creek or eastward from the point adopted by Bonillas. He found a number of other *devisaderos* along the north extremity of the range and eastward from that

selected by Bonillas, with old monuments along them (R., 47), and the only distinguishing feature of the latter was the fact that it was more isolated and the farthest west (R., 47). Mr. Bogan (R., 60) likewise testified to the fact that going northwest from Aribac and on the south side of the river there are a number of lookout hills and prominent peaks, at least a dozen, and there are numerous piles of stones on these peaks (R., 61). This concluded the oral testimony on this subject.

BRIEF AND ARGUMENT.

The Government's contentions are:

First. That this grant, if considered one by name or by natural objects, is so vague, uncertain, and indefinite as to be incapable of location.

Second. That if considered one for the quantity named it is likewise void for uncertainty.

Third. That upon the record this is not a grant lawfully and regularly made under the laws and regulations in force in Mexico.

Fourth. That the pretended grant was not located or duly recorded as required by the Gadsden treaty.

I.

This grant, considered as one by natural boundaries or one of a place by name, is void for uncertainty.

Under the laws prevailing at the dates named in the titles there was no provision for grants *ad corpus* As has been fully discussed and determined by this court in Arizona cases heretofore decided, the entire system was one of sale *ad mensuram*, of a given quantity in

sitios for a named price per sitio. There is thus no ground for claimant's contention that this grant is one either of a place by name or one by natural boundaries. Assuming it, however, for purposes of argument to have been either, it is void for uncertainty in the description.

The familiar rule, of course, is that the description of the premises conveyed must be sufficiently definite and certain to admit of identification of the land; otherwise it will be held void for uncertainty. (2 Devlin on Deeds (2d ed.), §1010; Spaulding on Public Lands, p. 272; *Boardman* v. *Reid*, 6 Pet., 328; *United States* v. *Lawton*, 5 How., 10; *Smith* v. *United States*, 10 Pet., 326.)

Does the description in the proceeding of 1833, in the light of the evidence, identify the land? It is believed the statement and discussion of the testimony above set forth shows that it does not; and that there is absolutely no guide afforded by the record that will enable the court to say what hill constitutes the north boundary, what mesquite tree the east boundary, what pile of stones the south boundary, or what *devisadero* the limit on the west. The testimony has been so fully discussed hereinbefore that little attempt will be made to add anything here. It seems to be urged by claimant, however, in its brief (p. 9) that the testimony of Mr. Flipper, as found on pages 48 and 50 of the record, is sufficient to locate the grant. His testimony is as follows:

> After going over the ground thoroughly—and the description in the title papers is exceedingly indefinite—after going over the ground

and with this description I am prepared to say that I can not locate the grant absolutely but approximately. I think I can locate what I believe to be the north line, and the east line, and the west line.

Mr. Flipper then testifies:

I think the east center monument is up the valley—farther up the valley than this spring.

If this affords claimant a satisfactory solution of its east boundary it must be very easily satisfied. Its east boundary is undoubtedly above the spring, but where? Is it a half mile, 2 miles, or the full 4 miles taken by Bonillas? Certainly the record does not afford any solution of this uncertainty.

But it is contended that Mr. Flipper, by his testimony on pages 48 and 50, settles the west boundary. He says (p. 48):

I think * * * the west center monument *probably* is the same one that Mr. Bonillas took. What is described in the title papers as the point of the water is a movable point. The point where the water stops running is farther up or down the creek, according to the season of the year.

And on page 50:

Q. In effect you testified that this west center monument answers the call?

A. I think that monument would answer the call.

Q. You say this description is very indefinite?

A. Yes, sir; it is exceedingly so, compared with descriptions of lands in other titles. There

is no survey. He does not give courses and distances.

This testimony of Mr. Flipper, when construed with the rest of his testimony, does not state that the original west boundary is where Bonillas put it. All he says is that, that point "would answer the call;" and so would any one of the dozen other divisaderos on the south side of the river mentioned by witness Bent, taken in connection with the constantly changing "end of the water," testified to by Mr. Flipper as a movable point.

Upon the south boundary it can hardly be contended by claimants that Mr. Flipper's statement (R., 48) that this "is somewhere south of the Aribac Creek, I do not know where," is a location, or that his suggestion that the north boundary line should run parallel with the general course of the river affords any solution of the question of the distance at which it should be run from the river, whether through the Bonillas monument, the Red Hill, Telegraph Hill, or one of the many other monumented divisaderos. Counsel's argument that the north and south boundaries should be run equidistant from the river is ingenious, but is more suggestive of a location *de novo* than an identification of old boundary calls. Counsel, on page 12 of his brief, dwells with great approbation on the dissenting opinion of Mr. Justice Sluss, and in the excess of his approval makes bold to assert that the opinion of the majority was "without an examination of the evidence." It is believed that this court will find in the record the

amplest proof that the evidence was discriminatingly considered by the majority of the court below, and that conceding that all the descriptive elements to which the learned dissenting judge refers in his opinion are "there," such elements fall very far short of identifying the tract. At the risk of repetition, it may be suggested that while, as the learned judge suggests, the *punta de agua* is "there"—at one season—it is a mile and a half away when Flipper goes there at another season—a case of "now it is and now it isn't;" and that while "the canyon covered with trees" is there, not one, but *three*, canyons answering the description are "there;" and what further complicates matters is the presence along these canyons of a thousand and one little hills of the description given in the titles upon which the original pile of stones *may* have been put. The ample opportunities for conjecture as to the location of this grant are illustrated by a comparison of the surveys made for claimants, respectively, by Bonillas, already discussed, and that made for claimant by Oury and referred to as Exhibit A in claimant's petition. (R., 3.) While this latter map was inadvertently omitted from the transcript, the original has been filed with the clerk of this court for consideration as a part of this argument. It is respectfully submitted that the court below was right in declaring the grant void for uncertainty.

II.

Considering this a grant for the quantity named, to wit, 2 *sitios*, it is still void for uncertainty.

If this is a grant of 2 *sitios*, where are such *sitios* located? What is there in the record to tie them to any particular land? There is no original survey or field notes to afford a guide; there is no center or initial point as in the other Arizona grants; the exterior boundaries, as has just been shown, are incapable of identification.

It was with the view of supplying a theory as to the proper location of 2 sitios that claimants produced Roskruge on the hearing (R., 66–69) to testify to a survey made by him in 1881 for the surveyor-general of Arizona. The plat of that survey was omitted by the clerk from the record, but the original has been filed with the clerk of this court for its consideration should it deem proper to do so. Roskruge testifies that his survey embraced 8,680.52 acres, or 2 sitios, and included old Aribac and the present town of Aribac, also the running water on the grant and all the valley (R., 67); that it runs about 2 miles above the present town of Aribac or to about a mile above the spring (where the water begins in the river) and about 3 miles below the town of Aribac and thus some distance short of the Bonillas's west boundary, which, according to Bonillas, is the limit of the water in that direction. Thus Roskruge included some of the dry portion of the grant toward the east and left out some of the water on the west end. His location was thus entirely arbitrary, as indeed he admits (R., 68) where he says:

> I surveyed the 2 leagues of land. It was left a good deal to me. They wanted it for cattle

raising in that valley. I used my own judgment as to where to locate it.

As Roskruge admits (R., 69) that he is not a cattleman, but simply a surveyor, his judgment as to what constitutes a proper 2-sitio cattle ranch is hardly instructive, much less persuasive, upon the court. Grazing is as important as water for cattle, and Mr. Flipper's testimony (R., 48) shows that there is excellent grazing at the east and west ends of the grant, and thus in the very portions which Roskruge has left out of his ideal ranch. If the realm of conjecture is to be entered into, it is believed that many more plausible theories as to the form and location of these 2 sitios from the standpoint of the cattleman can be presented to this court than that suggested by Roskruge; it is safe to say, at least, that many equally plausible might be conceived, and all of them equally consonant with the purposes of the original concession. It is respectfully submitted, however, that it is no part of the duty of this court to enter into the domain of speculation as to the proper shape and location of a 2 sitio cattle ranch of 1833, whether it shall be a league wide by two long, as in the San Rafael del Valle grant, or less than that in width and more in length, as in some other grants; whether it shall cover the west end, where the water is most abundant, or the east end, where the pasturage is best. It was never intended by the *Ely Case* (71 U. S., 220, 241) to declare it to be the power of the court to make locations of grants, but simply to declare the original location. That decision

does not authorize the arbitrary fixing of boundaries, but simply declares it to be the duty of the court, if there be facts enough, to "*determine the true boundaries* of the tract as granted."

It is respectfully submitted that this claim, whether considered one by metes and boundaries or one for the quantity named, is not supported by facts sufficient to enable the determination of the true boundaries of the tract granted.

III.

THIS IS NOT A TITLE LAWFULLY AND REGULARLY DERIVED FROM THE GOVERNMENT OF MEXICO OR THE STATE OF SONORA.

At the very outset of the investigation of the title asserted, we are met with this question, from which Government, Spain, Mexico, or the State of Sonora, was this title derived? To what land-tenure system and to what laws shall we look to determine the legality and regularity of its derivation? The laws of the former Government applicable to the case are domestic laws and the acts of the officials are to have their validity tested by them. The requirements as to jurisdiction imposed by the act of 1891 are mandatory and no claim is entitled to recognition which is not brought within each and every provision of that act. This claim must rest for its recognition upon a compliance with the laws of Spain or Mexico or some State of the Republic of Mexico having lawful authority to make grants of lands. The burden is upon the claimant to show that his title conforms to the requirements

of the laws of the country from which it is derived, and that it is thus entitled to recognition from the United States.

> *United States* v. *Coe*, 170 U. S., 697; *United States* v. *Ortiz*, 176 U. S., 422; *United States* v. *Elder*, 177 U. S., 104.

The proceedings under which this title is asserted have already been outlined. From the titulo it appears that the heirs of Ignacio Ortiz took testimony before an alcalde as to their father's rights. As intimated in *Whitney* v. *United States* (167 U. S., 547), this proceeding was ineffectual as against the Government, the latter not being represented or in any way a party to it. These *ex parte* depositions were presented to the treasurer-general with a petition by the claimants for the issue of a grant to them under the provisions of article 27 of the law of May 20, 1825 (Reynolds, 131). That law provides:

> 27. Those who possess sitios, and who, although they have them registered and surveyed, have not obtained the title, shall present themselves to the treasurer-general and shall state in writing the cause of that failure, the deputy or judge who made the survey for them, and the payments they made.
>
> 28. The treasurer shall fix for this purpose the time that seems to him proper, and, as soon as he gets all the information together, shall render a report to the Government, which shall order the proper steps taken with regard to the rights of the parties in interest and those of the treasury.

Notwithstanding the fact that the proof presented to him failed to show the survey of the tract or the deputy or judge who made the original survey as required by that law, the treasurer-general referred the matter to the governor of the State on June 21, 1833, and the latter on June 22, 1833, ordered the title to issue, and this was done on July 2, 1833. Was this proceeding effectual to convey title; or, in other words, does it constitute in the present petitioner a title lawfully and regularly derived?

It has been said in *Republic* v. *Thorn* (3 Tex., 499; cited in *United States* v. *Coe*, 170 U. S., 686), that the Mexican nation "was not formed by constitutional compact between several separate independent States," and that "in the Mexican union the general government claimed originally the property in the public domain."

It follows as a necessary corollary from this that the only power of disposition of public land which the several States could exercise subsequently was that conceded to them by the nation.

If the theories of the State officials as to the rights of Ignacio Ortiz in the land here sued for are to be accepted, the nation at the date of the Mexican independence succeeded to the legal title to the land but burdened with a perfect equity thereto inhering in Ignacio Ortiz or his heirs. This being the case, the subsequent transfer to the State of the right to sell public land within its limits did not carry such lands for the reason that they were not public lands in the

sense in which that term is used throughout the Mexican legislation. In other words, the duty of divesting itself of a naked title and investing such in the parties entitled thereto belonged to the national Government at the date of this grant, and in that view of the matter the present proceeding which was initiated and consummated by State officials was void. If, on the other hand, the land was public domain and thus passed to the State authorities for disposition, subject to the right of the nation to provide at any time other machinery for its disposition, then in 1833 this land was not a subject of sale by the treasurer-general either with or without the concurrence of the governor of the State, but was under the control of the board of sales created by the decree of July 20, 1831. (Reynolds, p. 157.)

This decree or law has been considered and discussed in a number of cases heretofore pending in this court, among them *United States* v. *Coe* (170 U. S., 696; 174 U. S., 579) and *United States* v. *Faxon* (171 U. S., 244). In these cases it was urged on behalf of the Government that by this law the machinery was provided by means of which the Government might sell the property of the nation to raise revenue. This law did not repeal the colonization law of August 18, 1824, this being one for revenue and the other for colonization, yet it was inconsistent with the laws of the State of Sonora, under which the State was attempting to sell property for the purpose of revenue and not for colonization. The fact that this law was in force

in Sonora is recognized by this court in *United States* v. *Coe* (170 U. S., 698, 700), where the words "supreme government," as used in section 126 (Reynolds, p. 158), are construed to mean the National Government, and it is held that the approval of the governor of Sonora was not sufficient to create title; and in the same case, in discussing that law, the Court of Private Land Claims said:

> When the property had been knocked down, a minute or report of the proceedings was to be made and transmitted to the supreme government and the sale could not be carried into effect: that is, the proceedings remained *in statu quo* until the approval of the supreme government was given.

It was similarly said by the Court of Private Land Claims in the case of *Faxon* v. *United States:*

> On the board of sales created under the decree of July 20, 1831, and that of April 17, 1837, alone was this power of disposition conferred, and the strict rules and regulations enacted for the government of those boards in the conduct of such sale precludes the idea that any single officer, although a member of the board, could exercise the power.

In the same case on appeal (171 U. S., 244, 252, 257), these regulations are discussed, and it is said by the court, speaking through Chief Justice Fuller (p. 258):

> While these various laws are rather confusing in their number and minuteness, nothing is clearer than that the power to make sales

> and grants was vested in the Treasury Department of the nation, and governed by strict rules and regulations, none of which contemplated that any single officer could make the sales. It is enough that the departmental treasurer did not possess the power, acting singly and on his own responsibility, to conclusively determine to what class lands belonged and their value, and having decided these points, thereupon to exercise the sole power of sale.

The law just quoted is, it is respectfully submitted, controlling of the present case. At the time of this attempted alienation by the treasurer-general upon the authority of the governor of Sonora, neither had the power to alienate public land for the reason that the decree of July 20, 1831, confided that power to a board of sale convoked in each instance under specific authority from the National Government, and constituted as provided in the law just cited. Even though the lands here disposed of were not the subject of revenue, being apparently granted in satisfaction of a preexisting national obligation, that fact rather increases than diminishes the force of the contention that it was a matter not for the local authorities, but for the National Government to attend to through the instrumentality of its board of sales. Certainly to countenance in an officer not generally possessed of the right to dispose of land the power to dispose of it under certain conditions and also the power to decide when such conditions arise would practically invest him with unlimited jurisdiction in the matter: and to say that the treasurer-general could make titles to land

whenever he and the governor decided a proper case existed was in effect to give them concurrent jurisdiction with the board of sales, which it can not for a moment be contended was the fact. This very proposition was ruled by this court in the Faxon case just quoted, where it was held that the departmental treasurer did not possess the power to conclusively determine to what class lands belonged and thereupon to exercise the sole power of sale. If sections 27 and 28 of the Sonora law of May 20, 1825, cited in these papers, can be considered as referring to rights other than those initiated by the State (which it is respectfully submitted it did not), certainly its provisions were superseded by the law of July 20, 1831, which was a resumption by the nation of the power to deal with its lands, and even if the treasurer-general could be considered after the enactment of the last law the officer to execute such formal titles, it is very evident that the "government" from which he must thereafter derive his authority to do so was not the governor, the official who was consulted in this case, but the National Government, acting either directly or through its board of sales.

Nor can it be contended that, rejecting the act of the State officials in extending this title, this grant is still entitled to confirmation on the ground that those officers found a perfect equity to belong to the Ortizes. The adjudication of these officials is as lacking in effect as was their extension of title. If they had no power as executive officers to grant away the nation's lands, even less did they have the power

to adjudicate it away, especially when it is recalled that this was a proceeding to which the nation was no party. Divesting this record, therefore, of the acts of these State officers, which for the reasons just stated were void, all that remains in the record, outside of the oral testimony above discussed as to the location of the natural objects, is the testimony presented to the treasurer-general, consisting of the three affidavits taken before the alcalde in 1833 and the certificate of payment by their father in 1812. There is not a vestige of testimony in the record outside of these affidavits to fix the boundaries or to show any substantial possession or claim of ownership by either the plaintiff or its predecessor in title. It will hardly be contended that these *ex parte* statements were of any probative force against the Mexican nation, or that they are of any force against its successor, the United States. To hold this would be to ignore every principle upon which courts proceed the world over in the admission of testimony.

IV.

THE GRANT HERE ASSERTED WAS NOT LOCATED OR DULY RECORDED AS REQUIRED BY THE GADSDEN TREATY.

If this be construed to be a grant of 2 sitios within the larger tract described by the witnesses of 1833, it is, for the reasons stated in the briefs for the Government in the cases of *United States* v. *Green* and *Christie* v. *United States* (109 and 129, present term), a grant that was not located at the date of the treaty. A repetition here of all the considerations there urged would

seem unnecessary in view of the fact that this case will, it is anticipated, be submitted to the court for its consideration at the same time as the cases just named. If, on the other hand, this be construed to be a grant to the outboundaries, wherever they are, it is still not located, as it does not appear from the record that an authentic survey was ever made of the grant, which, under the decision of this court in *Ainsa* v. *United States* (161 U. S., 208) and *Ainsa* v. *New Mexico and Arizona Railroad* (175 U. S., 76, 85), was essential to the proper "location" of a grant under the provisions of the Gadsden treaty.

Is this grant "duly recorded" in the archives of Mexico, as required by article 6 of the Gadsden treaty?

Absolutely the only reference to this grant in the archives is the toma de razon, made in the proper book, but on a page other than that stated on the titulo, said toma de razon being as follows (R., 69):

> On the 12th day of July there was delivered to Capt. Don Ignacio Elias Gonzales the grand title issued on the 2d of July of the current year for 2 sitios of land for raising cattle and horses, which is comprised in the place called Aribac, situate in the jurisdiction of the upper Pima country, in favor of citizens Tomas and Ignacio Ortiz, residents of the presidio of Tubac.
>
> MILLA.

Was this a sufficient record of the grant? The court below was divided, a majority being of the opinion that it was a sufficient compliance with the terms of the treaty. It is respectfully submitted,

however, that the opinion of Chief Justice Reed (R. 70) states the law of the case in holding that the presence of the expediente in the archives was necessary to a complete "record." As was said in the brief for the United States in the Ainsa case—

> A proper construction of this provision of the treaty requires that the existing state of the law should be considered; that is to say, the laws of the country in which these records or archives were to be found. It is well known as a matter of history that the manner of preserving records of grants and other important instruments in Spain and Mexico was different from that which obtains in this country, and that the customary manner of preserving records of proceedings leading up to a grant in Mexico was to deposit the original in the archives and to give to the proper party a copy of such original, which was known as the testimonio, duplicate, or second original. There was also a requirement that a memorandum of the grant should be entered in the proper book, called "Toma de Razon," and when a history of the original proceedings (*expediente*) was properly deposited in the archives and a minute of the grant entered in the "Toma de Razon" this constituted a record of the grant, and when these two steps had been taken the grant had been "duly recorded" as provided by the treaty, and until both these steps had been taken the grant had not been "duly recorded."

It seems unnecessary as showing what is meant by a "record" to do more than to cite the court to the long line of California cases, beginning with *Fuentes* v. *United*

States (22 How., 443) and running down to *Peraltas' case* (3 Wall., 434). In *Luco's case* (23 How., 515) it was held that no grant should be received as genuine by the courts of the United States "unless it be found noted in the archives, or the *expediente* or some part of it be found on file among the archives where other and genuine grants of the same year are found." In *Bolton's case* (23 How., 347) it was held that the record referred to in the regulations of 1828 is "the *evidence* of the grant," and that while the *título* given by the governor "serves among individuals the purpose of evidence," the Government, when it institutes inquiries in reference to the subject, is "entitled to require the production of that official record, which it has prescribed to its officer for its own security and as a necessary condition of a legal administration and as a necessary precaution against fraud." So *Vallejo's case* (1 Black, 541), quoting *United States* v. *Sutter* (21 How., 175), says that "in every well-regulated government the deeds of its officers conveying parts of the public domain are registered or enrolled to furnish permanent evidence to its grantees of the origin of their title." So in the *Peralta case* (3 Wall., 434) it was said:

> But the important fact to be noticed is that a record was required to be kept of whatever was done. This record was a guard against fraud and imposition, and enabled the Government to ascertain with accuracy what portion of the public lands had been alienated. The record *was the grant*, and without it the title was not divested. The governor was required to give a

> document to the party interested, which was evidence of title, and enabled him to get possession, but his "*título*" did not divest the title unless record was made in conformity with law.

To the same effect are the *Teschmaker case* (22 How., 405), the *Pico case* (22 How., 406), the *Castro case* (24 How., 346), case of *Knight's administrator* (1 Black, 228), *Neleigh's case* (1 Black, 298), *Romero's case* (1 Wall., 743), *White's case* (1 Wall., 660), the *Berreyesa case* (23 Lawyer's Coop. ed., 912), and the more recent cases of *Ortiz* (176 U. S., 422), *Elder* (177 U. S., 104, 118), and *Whitney* (181 U. S., 109).

Perhaps the latest expression from this court on this point is found in *United States* v. *Elder* (177 U. S., 118), where this court, speaking through Mr. Justice White, says:

> The constituents of the preliminary papers leading up to a grant, and of the grant itself, and the distinction between them, to which attention had been so often directed by this court, was pointedly reiterated in the statement of the case made by Mr. Chief Justice Fuller in *Hinsa* v. *United States* (161 U. S., 208, 219), as follows:
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> "An expediente is a complete statement of every step taken in the proceedings, and a testimonio is the first copy of the expediente. A grant of [or?] final title paper[s] is attached to the testimonio and delivered to the grantee as evidence of title, and entry is made at the time in a book called the Toma de Razon, which identifies the grantee, date of the grant, and property granted."

It is manifest from the foregoing review of

> the decisions under the California act that it was held that, in order to vest an applicant under the regulations of 1828 with title in fee, either absolute and perfect, or conditional and imperfect, to public land, substantial compliance with the preliminary requisites to a grant was essential: it was necessary that a grant should be evidenced by an act of the governor, clearly and unequivocally conveying the land intended to be granted, and a public record in some form was required to be made of such grant.

In the case of *United States* v. *Castro* (24 How., 349) it is said:

> It is sufficient to say that it [the grant] was required to be in writing, the officers and tribunals before which it was to pass designated, and every step in the process from the petition of the party to the final consummation of the title was not only required to be in writing, but also to be *deposited* and *recorded* in the proper public office among the public archives of the Republic.

The necessity for both *deposit and record* in the public archives is reiterated in *Berreyesa* v. *United States* (154 U. S., 623), cited with approval in *Whitney* v. *United States* (181 U. S., 110).

> The case of *United States* v. *Vallejo* (1 Black, 555), discusses the necessity for both retaining the original in the archives and making a record of the grant, the first being done in all civil law countries, so that parties may secure certified copies thereof, and the other to afford the

government protection against its officers and notice of their actions.

In *Peralta's case* (3 Wall., 434), above cited, which is the leading one on the subject, reference is made to the presence of the expediente in the archives as a part of the record evidence necessary to support the claim.

That the mere *toma de razón*, brief and incomplete as it necessarily was, did not suffice to constitute a full record is shown in the provision of section 9 of the Regulations of November 21, 1828 (Reynolds, 142), where it is provided that not only an entry of "all applications presented and grants made shall be made in a book intended for the purpose," but that there should also be entered "the maps of the lands that shall be granted." (See discussion of this law in *Bolton's case*, 23 How., 350.) In the absence of maps, which were not usually made in the Sonora grants, the policy of the law required that at least the expediente, which embodied the field notes of the survey and a description of the property, should be retained in the archives so that in connection with the *toma de razón* entry the Government or its successor in sovereignty should have the full facts as to the land to which title had been given. The testimony of Bonillas (R., 16) shows the practice in Sonora as to the record. The purpose of the provision in the treaty was evidently that the United States might know what it was getting and might not run the risk of being confronted with claims of which the Mexican archives did not give it full notice. Did the

brief *toma de razón* in this case accomplish that purpose? When it is recalled that, that entry does not give a description of the property, but simply refers generally to its situs in terms so general that Bonillas admits (R., 15) that he would have been unable to locate it but for the contents of the *título*, it would seem that such entry was hardly enough to satisfy the spirit and intent of the treaty. Indeed, the treasurer-general himself in issuing this title (R., 24) states in terms what shall constitute the record when he provides that the expediente remains in the archives of his office as "a perpetual record." Where is the expediente of 1833 to which he thus refers, and the expediente of 1812, which presumably contains the full details of the original transaction? Certainly claimants are under obligations to produce or to account for the nonproduction of what is solemnly declared by their own titles to be the "perpetual record" of its issuance.

The case of *United States* v. *Osio* (23 How., 279, 280), cited by claimant, is not, it is believed, controlling upon this question. That was one of the early cases on the subject of "record," and the rule as laid down by the line of cases above cited was made much stricter thereafter, as the enormous possibilities for fraud flowing from the Pico régime in California became more and more apparent; and it is not believed that, that case in so far as it indicates that a mere *toma de razón* in the archives is, without the expediente, a sufficient record is sustained by the later cases. But the very terms of that decision, which requires the

toma de razón to state the number of the expediente, shows that it was contemplated that there would be in the archives an *expediente* to which this entry would be at all times referable. It is further noted that Osio's case provides that the entry shall contain a brief description of the land; the toma de razón here does not measure up to this standard, since, as above pointed out, the land is confessedly incapable of identification except by reading in connection with it the titulo from private hands. The lack of all evidence of possession under this grant, the discrepancy between the page of the tema de razon as produced and the page given in the indorsement on the titulo, and the embodiment in the titulo of requirements as to a fee that was imposed only by a law passed the year following, are all circumstances which call for the strict enforcement in this case of the legal requirement of full archive proof of the grant.

It is respectfully submitted that upon all the grounds herein urged the judgment of the court below rejecting the claim was right and should be affirmed.

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